TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 414

MICHAEL SHENKER, PETITIONER,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 5, 1962
CERTIORARI GRANTED NOVEMBER 19, 1962

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Proceedings in the United States Court of Appeals for the Third Circuit		
Appellant's appendix consisting of portions of the record from the United States District Court for the Western District of Pennsylvania	A	1
Relevant docket entries	1	1
Second amended complaint	4	4
Answer of defendant, The Baltimore and Ohio Railroad Company to second amended complaint	11	9
Transcript of trial (excerpts)	14	11
Reading of stipulations between parties and agreement	14	11
Reading of answers to interrogatories	16	13
Testimony of Michael Shenker—		
direct	20	16
cross	37	23
Examination by the Court	53	29
Testimony of Michael Shenker—		
direct	54	30

RECORD PRESS, PRINTERS, NEW YORK, N. Y., DECEMBER 27, 1962

	Original	Print
Appellant's appendix consisting of portions of the record from the United States District Court for the Western District of Pennsylvania—Continued		
Transcript of trial (excerpts)—Continued		
Colloquy between court and counsel	55	31
Testimony of Richard H. Moffatt—		
direct	60	34
cross	64	37
redirect	67	39
H. L. Banks—		
direct	68	40
cross	74	45
Donald Runyon—		
direct	76	46
cross	79	49
Examination by the Court	80	49
Motion for directed verdict, etc. (B & O)	80	50
Motion for directed verdict, etc. (P & L E)	80	50
Colloquy between court and counsel	81	51
Ruling on motion for directed verdict, etc.	87	55
Colloquy between court and counsel	88	56
Reading of stipulation to be substituted for a previous one	96	61
Ruling on motion for directed verdict, etc.	97	62
Testimony of Edward William Beck—		
direct	98	62
cross	101	64
redirect	102	65
Richard H. Moffatt— (recalled)—		
direct	102	65
cross	104	67
redirect	108	70
H. L. Banks— (recalled)—		
direct	109	71
Ruling on motion for directed verdict, etc.	112	71
Motion by the Baltimore and Ohio Railroad Company for directed verdict	120	77
Motion by the Baltimore and Ohio Railroad Company for judgment N.O.V.	121	77

	Original	Print
Appellant's appendix consisting of portions of the record from the United States District Court for the Western District of Pennsylvania—Continued		
Opinion and order, Marsh, J.	122	78
Order denying Baltimore and Ohio Railroad Company's motion for judgment N.O.V.	125	81
Final judgment	126	81
Opinion, Goodrich, J.	127	82
Dissenting opinion, Kalodner, J.	130	84
Judgment	135	89
Order denying petition for rehearing	137	90
Clerk's certificate (omitted in printing)	138	90
Order extending time to file petition for writ of certiorari	139	91
Order allowing certiorari	140	91

[fol. A] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 13755

MICHAEL SHENKER, Plaintiff,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, and THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, Defendants.

Appeal of The Baltimore and Ohio Railroad Company.

Appellant's Appendix—Filed October 2, 1961

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 16438

MICHAEL SHENKER, Plaintiff,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY and THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, Defendants.

RELEVANT DOCKET ENTRIES

1957

Nov. 21, Complaint filed with demand for jury trial thereon.

Dec. 7, Defendant's answer filed with acceptance of service thereon.

1959

Jan. 12, Order entered joining Pgh. & Lake Erie as party defendant and directing that amended complaint be filed. (Willson, J.)

Jan. 12, Amended Complaint filed.

[fol. 2] Feb. 2, Answer of defendant Baltimore & Ohio Railroad to amended complaint, filed.

Feb. 2, Answer of defendant Pgh. & Lake Erie Railroad to amended complaint, filed.

Oct. 12, Motion for leave to amend complaint filed by plaintiff.

Oct. 12, Proposed amended complaint filed by plaintiff.

1960

Jan. 20, Answer of defendant Baltimore & Ohio Railroad to second amended complaint.

Jan. 20, Answer of defendant Pgh. & Lake Erie Railroad to second amended complaint.

1961

Apr. 13, Trial opens before Marsh, J. and jury.

Apr. 17, Trial continues.

Apr. 18, Trial continues.

Apr. 18, Motion by Baltimore & Ohio Railroad for directing verdict, denied orally by the Court.

Apr. 18, Motion by Pgh. & Lake Erie Railroad for directed verdict, granted orally by the Court.

Apr. 19, Trial continues and concludes. Trial memo filed.

Apr. 19, Verdict filed. The jurors find a jury verdict in favor of the plaintiff Michael Shenker in the amount of forty thousand dollars ($40,000.00).

Apr. 19, Order entered at close of all the evidence, upon due consideration of motion of defendant Pgh. & Lake Erie Railroad for directed verdict, it is ordered that said motion be and the same hereby is granted and

[fol. 3] judgment be and the same hereby is entered in favor of the defendant Pgh. & Lake Erie Railroad. (Marsh, J.)

Apr. 19, Pursuant to granting of directed verdict for Pgh. & Lake Erie Railroad judgment is hereby entered in favor of defendant Pgh. & Lake Erie Railroad. James H. Wallace, Jr., Clerk.

Apr. 20, Order entered pursuant to the verdict of the jury empaneled in the above-entitled action directing the Clerk to enter judgment in favor of the plaintiff Michael Shenker and against Baltimore & Ohio Railroad Company, defendant, in the sum of Forty Thousand Dollars together with costs. (Marsh, J.)

Apr. 20, Pursuant to verdict and order, judgment is hereby entered in favor of Michael Shenker, plaintiff, and against Baltimore & Ohio Railroad Company, defendant, in the sum of Forty Thousand Dollars together with costs. (Judgment entered 4/20/61) James H. Wallace, Jr., Clerk.

Apr. 22, Motion for judgment n.o.v. filed by defendant Baltimore & Ohio Railroad.

May 15, Transcript of jury trial held in Pittsburgh, Pa., commencing on Apr. 13, 1961 before the Honorable Rabe F. Marsh, D. J., filed.

June 26, Hearing before Marsh, J. on motion for judgment n.o.v. (Marsh, J.)

June 26, Hearing concluded C.A.V. Trial memo filed.

Aug. 8, Opinion filed and order entered denying defendant Baltimore & Ohio Railroad's motion for judgment n.o.v.

Aug. 21, Notice of appeal filed by defendants.

[fol. 4]

IN UNITED STATES DISTRICT COURT

SECOND AMENDED COMPLAINT

(Trial by Jury Demanded)

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1. Plaintiff, Michael Shenker, for his cause of action says that the Defendant, The Baltimore and Ohio Railroad Company, is and was at all times herein mentioned a corporation, duly organized and existing under and by virtue of the laws of the State of Maryland, and engaged as a common carrier of freight and passenger transportation for hire, and as such owns, operates and controls various lines of steam and electric railway in the Commonwealth of Pennsylvania and various other States of the Union, and that in connection with its business as a common carrier it maintains, controls and operates freight and passenger stations for the loading and unloading of its freight and passengers, and in particular, it maintains a station in the City of New Castle, Pennsylvania, wherein passengers board and disembark from its trains and mail is loaded and unloaded from mail cars while the train is in the station.

2. Plaintiff says that the Pittsburgh and Lake Erie Railroad Company is and was at all times herein mentioned a corporation, duly organized and existing under and by virtue of the laws of the State of Ohio and that as such was engaged as a common carrier of passenger and freight transportation for hire, and as such owns, operates, and controls lines of railway in the Commonwealth of Pennsylvania and various States of the Union, and that in the course and conduct of its business, it takes on and [fol. 5] discharges freight and passengers at the Baltimore and Ohio Railroad Station located at New Castle, Pennsylvania.

3. That at all times herein mentioned the Defendant, The Baltimore and Ohio Railroad Company, permitted and allowed the Defendant, The Pittsburgh and Lake Erie Rail-

road Company, to use its tracks, station, employees and facilities for the taking on and discharge of freight and passengers under an arrangement and agreement between said parties, the terms of which are well-known to the Defendants, but are not known to the Plaintiff herein.

4. That at the time of the accident and injury herein complained of, the Plaintiff was a baggage man employed by the Defendant, The Baltimore and Ohio Railroad Company, at its New Castle station and at all times herein mentioned he was engaged in interstate commerce, and he directly, closely and substantially affected such commerce; and that by reason thereof, Plaintiff and the Defendants were engaged in interstate commerce and transportation; that the Plaintiff's action herein arises under the Federal Employers' Liability Act, 45 U.S.C.A., Sections 1-59, with Amendments thereto.

5. Plaintiff says that on or about the 15th day of October, 1956, he was employed by the Defendant, The Baltimore and Ohio Railroad Company, as a baggage man, his duties, among others, being to assist in loading and unloading freight on baggage and mail cars at the Defendant's, Baltimore and Ohio Railroad Company, passenger station.

That at about 12:25 o'clock in the morning of said day, while he was engaged in loading baggage consisting of mail and other packages from a truck or wagon into a baggage car in a passenger train, being operated by the [fol. 6] defendant, Pittsburgh and Lake Erie Railroad Company, and headed west to Youngstown, Ohio, through a narrow aperture or opening of the door on the south side of said car, which caused him in loading said bags from the truck to the mail car to turn and twist in an unusual and extraordinary manner while throwing said bags and packages through the opening, and as he was in the act of performing said duties suddenly, unexpectedly and solely by reason of the negligence of the Defendant, as hereinafter specifically set forth, one of the bags caught upon said car causing him to lose his balance, twist and turn, violently and forcibly, and sustain injuries in the following respects:

He sustained a contusion, twisting, wrenching and displacement of the muscles, nerves, ligaments and vertebrae of the spine and back, particularly in the lumbar and lumbo-sacral regions, with nerve root pressure and irritation, and that by reason of said injuries he sustained a concussion of the spinal column and cord and that by reason of said injuries his back has become tender, stiff and sore with a considerable loss of the function and use of said back, from all of which he suffers pain, tenderness and soreness.

Furthermore, by reason of said injuries he was required to undergo an operation upon his back and spine for the removal of a ruptured or herniated disk at the level of the fourth lumbar vertebrae, and that ever since the surgical removal of said lumbar disk his back has been exceedingly sore and tender, with excruciating pain in the region of his lower back and into his legs, and that by reason of said injury and operation there is a considerable loss of elasticity and limitation of motion throughout his entire back and lower limbs.

[fol. 7] He sustained a severe twisting, wrenching, bruising and contusion of the sacroiliac, buttocks and hips, and of the lower abdomen, so as to strain and wrench the nerves, muscles, blood vessels, skin and flesh of the stomach and stomach wall, and that by reason of said injuries the function of said parts and organs have become greatly weakened and impaired.

6. Plaintiff says that by reason of all of said injuries and accident, he sustained a severe and lasting shock to his general and central nervous systems, and from his experience, through the accident and injuries, his general health has become greatly weakened and impaired; and that he has been sick, sore, and greatly disabled ever since sustaining said injuries and will continue to be such for the rest of his life.

7. Plaintiff says that at the time of the grievances herein complained of and for some time prior thereto the door of said car was in a dangerous, defective and unsafe condition in that the door in said car would not open a sufficient width to permit the free and accessible loading of

said mail bags and freight; that said door and its operating parts were old, weak, worn, broken, and out of repair so as to cause it to stick and jam and not flow freely upon its runners, ball bearings or other appurtenances, and that the Defendants knew of said dangerous, defective and unsafe condition of said door and the failure of said door to properly and fully open, but, nevertheless, the Defendants directed and instructed the Plaintiff to load the freight and mail bags speedily onto the baggage car, so as not to delay trains, over and above the protestations of said Plaintiff and his request for additional help; that the Defendants failed to make any inspections or proper inspections of the conditions then and there existing and failed to warn or [fol. 8] apprise Plaintiff in loading the bags in the manner as hereinbefore stated that he would injure himself or liable so to do while in the performance of his work. That the Defendant, Pittsburgh and Lake Erie Railroad, negligently stacked and piled bags, packages and freight against said car door so as to hinder the easy and free opening of said door, so that when Defendants, Pittsburgh and Lake Erie Railroad Company's, employee, attempted to open said door wider, it failed to move and that Plaintiff was required to load the baggage through said narrow opening of the door.

8. Plaintiff states that for some period of time after reporting to the Defendant, Baltimore and Ohio Railroad Company, the accident and injury to his back, defendant negligently requested and caused him to report to work and perform his labor; that Defendant failed and neglected to provide him with any aid or assistance, manual or otherwise, while so physically conditioned and disabled, that Defendant negligently caused and permitted him, while so disabled and injured, to lift barrels of bricks, baggage, bundles of newspapers, and otherwise such as to cause him to place a constant stress and strain upon his back so as to further injure, aggravate, and irritate said back and spine.

9. Plaintiff says that the Defendants were careless and negligent in the following respects, to-wit:

First: In causing and permitting to be used in said train, a car which was in a defective, dangerous and unsafe condition, as herein set forth.

Second: In causing and permitting to be used in the train said car when the door and its other appurtenances were inefficiently operative and defective, as herein set forth.

[fol. 9] Third: In causing and permitting to be used in said train, a car whose door would not open sufficiently to permit the free and unhindered loading of mail bags, as herein set forth.

Fourth: In failing and neglecting to provide or supply Plaintiff with efficient and proper help and assistance in loading said car and avoid injuring him, as herein set forth.

Fifth: In causing and instructing Plaintiff to load said car over and above his protestations when its door was jammed and out of repair, as herein set forth.

Sixth: In failing and neglecting to make any inspection or proper inspections of the defective, dangerous and unsafe condition of said door, as herein set forth.

Seventh: In failing and neglecting to warn Plaintiff that he would injure himself or liable so to do because of the difficult and hazardous conditions surrounding the performance of his work, as herein set forth.

Eighth: In failing and neglecting to provide safe ways and means, safe equipment and appliances, and a reasonably safe place for plaintiff to perform his labor.

Ninth: In negligently stacking and piling said baggage against the door of the car so as to prevent it from being readily opened for the purpose of loading freight, as herein set forth.

Tenth: In failing and neglecting to repair said door or remove said freight from the door so as to permit it to freely open, as herein set forth.

10. Plaintiff says that the Defendants knew all of said dangers and conditions, or, in the exercise of ordinary care [fol. 10] should have known of said dangers and conditions, so that solely by reason of the negligence of Defendants herein, proximately operating, he was injured, as aforesaid.

11. Plaintiff says that prior to sustaining said injuries, he was in good health, 50 years of age, earning and capable of earning Three Hundred Twenty ($320.00) Dollars or more per month, but that ever since sustaining said injuries, he has been sick, sore and disabled, and will continue to be sick, sore and permanently disabled, by reason of said injuries, for the rest of his life, and that by reason of said injuries he has been incapacitated from performing gainful employment, whereon he is dependent for a livelihood.

12. Plaintiff says that he is a citizen of the Commonwealth of Pennsylvania and a resident of the City of New Castle and that the amount in controversy, exclusive of interest and costs, exceeds Three Thousand ($3,000.00) Dollars.

13. Wherefore, Plaintiff says that he has been damaged in a sum in excess of Three Thousand ($3,000.00) Dollars, for which he prays judgment against the Defendants herein.

John Ruffalo, 510 Mahoning Bank Building, Youngstown, Ohio;

James A. Wright, 434 Diamond Street, Pittsburgh, Pennsylvania, Attorneys for Plaintiff.

[fol. 11]

IN UNITED STATES DISTRICT COURT

ANSWER OF DEFENDANT, THE BALTIMORE AND OHIO RAILROAD COMPANY, TO SECOND AMENDED COMPLAINT—
January 19, 1960

And Now, January 19, 1960, one of the defendants, The Baltimore and Ohio Railroad Company, makes answer to the Second Amended Complaint as follows:

First Defense

This defendant admits the allegations of paragraphs 1, 2 (excepting the allegation as to "freight" and allegations

as to operations, etc., under alleged incorporation in Ohio), and 12 of the Second Amended Complaint; this defendant denies the allegations of paragraphs 7, 9, 10 and 13 of the Second Amended Complaint.

In answer to paragraph 3 of the Second Amended Complaint, this defendant admits that it permitted and allowed the other defendant, The Pittsburgh & Lake Erie Railroad Company, to use its facilities for the taking on and discharging of passengers under an arrangement between the parties, the terms of which are known to the defendants.

In answer to paragraph 4 of the Second Amended Complaint, this defendant admits that plaintiff was a baggage man employed by plaintiff and this defendant were engaged in interstate commerce and transportation; and that the plaintiff's action herein, if any, against this defendant would [fol. 12] arise under the Federal Employers' Liability Act.

In answer to paragraph 5 of the Amended Complaint, this defendant admits that on or about the 15th day of October, 1956, plaintiff was employed by this defendant as a baggage man, his duties among others, being to assist in loading and unloading baggage and mail cars at the passenger station of this defendant, and that at about 12:25 o'clock in the morning of said day he was engaged in loading mail from a truck or wagon into a baggage car in a passenger train being operated by The Pittsburgh & Lake Erie Railroad Company, and headed west to Youngstown, Ohio; as to all other remaining allegations of said paragraph 5 of the Second Amended Complaint, this defendant alleges that it has no knowledge or information sufficient to form a belief as to the truth thereof, and therefore denies the same.

In answer to paragraph 6 of the Amended Complaint, this defendant alleges that it has no knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph, and therefore denies the same.

In answer to paragraph 10 of the Amended Complaint, this defendant admits that at the time alleged in the Amended Complaint, the plaintiff appeared to be in good health, 50 years of age, and he was earning and capable of earning $320 or more per month; as to the remaining allegations of said paragraph, this defendant alleges that it is

without knowledge or information sufficient to form a belief as to the truth thereof, and therefore denies the same.

[fol. 13]

Second Defense

As an affirmative defense, the defendant, The Baltimore and Ohio Railroad Company, alleges that the baggage car into which plaintiff states that he was loading mail formed part of a passenger train of The Pittsburgh & Lake Erie Railroad Company, a corporation, and neither the said car nor the said train was owned by the defendant, The Baltimore and Ohio Railroad Company, nor did it have any control or right of control over any part of the same.

Third Defense

This defendant states that if the plaintiff did sustain an accident as alleged by him, the same was not due to any negligence on its part, or its agents, servants and employees, but was caused in whole or in part by the negligence of the plaintiff in failing to look out for his own safety, and therefore pleads contributory negligence of the plaintiff as a defense in diminution of damages.

E. V. Buckley, Mercer & Buckley, Attorneys for defendant The Baltimore and Ohio Railroad Company.

[fol. 14]

In United States District Court

Transcript of Trial—April 13, 1961

The Evidence

Jury trial held in Pittsburgh Pennsylvania commencing on April 13, 1961 before the Honorable Rabe F. Marsh, D. J.

* * * * * * *

Mr. Ruffalo: Members of the jury, I would like to take the opportunity to read to you certain matters which have been agreed on or stipulated upon in this law suit between the parties, the plaintiff and the defendant.

It is stipulated to and agreed to 1, that Michael Shenker, plaintiff, was a baggage man employed by the defendant, the Baltimore & Ohio Railroad Company, at its station in New Castle, Pennsylvania.

2. The general employment of the plaintiff, Michael Shenker, was in interstate commerce.

3. Both defendants are engaged in interstate commerce.

The Court: Can we change that stipulation to read that at the time of the accident, both—

Mr. Ruffalo: At the time of the accident.

The Court: Both plaintiff and defendant companies were engaged in interstate commerce.

Mr. Ruffalo: Yes, Your Honor.

The Court: Is that all right?

[fol. 15] Mr. Mercer: That's all right.

Mr. Ruffalo: 4. The Pittsburgh & Lake Erie Railroad Company, the other defendant, was authorized by contract with the Baltimore & Ohio Railroad Company to use the facilities of the station at New Castle, Pennsylvania, for the taking on and discharging of passengers and the loading and unloading of baggage and mail.

5. On October 15, 1956, at about 12:25 o'clock in the morning of said day, plaintiff was loading mail from a truck or wagon into the baggage car of a passenger train being operated by the Pittsburgh & Lake Erie Railroad Company and headed west to Youngstown, Ohio.

6. Plaintiff claims to have injured his back while in the process of loading mail.

7. Plaintiff reserves the right to offer statement from defendant's answers and from defendant's answers to certain interrogatories which he, the plaintiff, believes to be admissible.

It was also agreed upon and stipulated by counsel for the plaintiff and counsel for the Baltimore and Ohio and Pitts-

burgh & Lake Erie Railroad Company that if Dr. Arnold, the doctor who operated upon the plaintiff, would not attend this trial, that it would be permissible to state and stipulate to the fact in these words, that the defendant further stipulates that in the event it should be impossible for the doctor to come to Pittsburgh to testify, then the defendant hereby stipulates that in January of 1957, Dr. Arnold per-
[fol. 16] formed an operation for a ruptured intervertebral disc at L-4 on the left side of the plaintiff.

At this time, the plaintiff would like to read the answers to the interrogatories which were propounded by the plaintiff and which answers were given by the defendant, the Baltimore & Ohio Railroad Company and the Pittsburgh & Lake Erie Railroad Company.

Question 4: Give the number of the train onto which plaintiff was loading baggage on October 15th, 1956 at the New Castle Station. Train No. 79.

5. State the time said train left the Pittsburgh station.

The Court: What interrogatory is that?

Mr. Ruffalo: No. 5. Subsection (a), question under that. State the time said train arrived in the station in Mahoningtown, New Castle, Pa.

(b) State the time of said train's departure from the station in Mahoningtown.

(c) State the time said train was due to arrive in Youngstown, Ohio.

And the answer to that is that the train left Pittsburgh at 10:50 p.m. (a). There is no record of the time of train's arrival in Mahoningtown, New Castle, Pennsylvania.

(b) The time of the train's departure is stated as 12:25 a.m.

(c) The time of its arrival in Youngstown was one a.m.

[fol. 17] Interrogatory No. 8: State the point of origination of the train onto which plaintiff was loading baggage and freight. The answer to that Question 8 is Pittsburgh, Pennsylvania.

Then (a) under that, State whether or not baggage and freight was loaded onto the baggage car at the point of origination. The answer to that is yes.

Interrogatory No. 9: State whether or not said train had made any stops prior to the New Castle stop to take on baggage or freight. The answer to No. 9 is yes.

(a) under that, If the train had made any stops prior to New Castle, give the name of the place where these stops were made.

It states (a) Coraopolis, Aliquippa, Beaver, Beaver Falls, New Brighton and Wampum.

(b) State whether any baggage or freight was loaded or unloaded at these stops. The answer to that is yes.

Interrogatory No. 12: Give the length and width of the bed of the mail truck used on October 15, 1956 by the plaintiff in loading mail onto the baggage car.

The answer to 12 is Length of bed, 119 inches. Width of bed, 48 inches.

(a) State whether said car is a four-wheel, three-wheel or two-wheel baggage truck. The answer is four-wheel.

(b) State whether said truck is manually drawn or motor operated. The answer to (b) is manually.

[fol. 18] (c) State whether the height of the bed of the truck from ground level. The answer to that is 37 inches.

(d) State whether the truck is equipped with pneumatic or hard rubber tires. The answer to (d) is no.

Interrogatory 13: Give the dimensions of the canvas bags used for baggaging mail, freight and other commodities.

The answer to that: Different sized canvas bags are used for bagging mail which the plaintiff alleges he was loading. The larger of these is 31 inches wide and 37 inches deep. The smaller is 24 inches wide and 35 inches deep.

Interrogatory 14: State the number of men employed in loading baggage onto the baggage car on October 14 and

October 15, 1956 between the hours of 11 p.m. and seven a.m. The answer is one man.

(a) Give the name of the men who were employed. Answer: Michael Shenker.

Interrogatory 17: State whether or not the Pittsburgh & Lake Erie Railroad Company maintains any employees at said station. The answer to 17 is no.

(a) State whether or not the Pittsburgh & Lake Erie Railroad Company has any supervisors at said station for the purpose of supervising the loading and unloading of baggage cars. The answer to that is no.

(b) State whether or not the Pittsburgh & Lake Erie Railroad Company maintains any inspection supervisors [fol. 19] of the loading and unloading of baggage on its trains on said station. The answer to that is no.

Interrogatory 20: State whether or not passengers of the Pittsburgh & Lake Erie Railroad Company are boarded and discharged at said station. The answer to that is yes.

21: State whether or not tickets are sold at said station for passage on the Pittsburgh & Lake Erie Railroad Company. Yes.

22. State in whose employ the ticket agent is. The Baltimore & Ohio Railroad Company.

24. State the hourly rate of pay of the plaintiff on October 15, 1956. His hourly rate of pay at that time was $1.8663.

Interrogatory 25: State whether or not there has been given any wage raises in plaintiff's job classification. The answer to that is yes.

(a) If raises have been given, give the amount and the date for each raise given.

Answer: November 1, 1956, 10 cents per hour.
May 1, 1957, 3 cents per hour.
November 1, 1957, 12 cents per hour.
May 1, 1958, 4 cents per hour.
November 1, 1958, 8 cents per hour.

These questions are admitted in evidence and you may, members of the jury, accept them as admitted evidence. Thank you.

• • • • • • •

[fol. 20] Michael Shenker, the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Ruffalo:

Q. Will you kindly state your name?
A. Michael Shenker.
Q. Where do you live?
A. New Castle, Pennyslvania. 404 Connor Avenue.
Q. How old are you?
A. 53.
Q. Are you married?
A. Yes, sir.
Q. How far did you go in school?
A. Part of first year high school.
Q. Are you employed?
A. Well, I am not working now.
Q. Where were you employed?
A. B & O Railroad.
Q. How long have you been employed by the B&O Railroad Company?
A. You mean now? If I was there yet?
Q. How long were you employed by the B&O Railroad Company up until the date of your injury?
A. Oh, going on five and a half to six years.
Q. In what capacity were you employed by the B&O Railroad Company?
A. Baggageman, mail man, caller.
Q. Going to the morning of October 15th, 1956, at about 12:25 o'clock, what occurred on that date?
A. Well the mail men brought the mail down. I loaded my mail on the truck. I got the mail loaded. I pulled it across the tracks, over to the P&LE Station. I spotted my [fol. 21] truck where I thought the train would come in and waited for the train.

Q. When the train came in, what did you do?

A. They stopped, pulled my truck up by the door and locked the wheel and waited to see if get the door open. Couldn't get the door open, tried to push the door up with my hand on it. I put my hand on it, tried to help them, couldn't get it open. Baggageman told me, get it out the best we could, throw mine around the corner. He handed his out to me.

Q. What did you say to the baggageman there, if anything?

A. Well, do you mean conversation?

Q. Did you have any conversation with him?

A. We talked about the mail. We talked about the door.

Q. What did he say?

Mr. Mercer: Wait a minute here. I object to this hearsay.

The Court: Objection overruled.

A. He said about the mail, what I told you, about throwing mine around the corner and about the door, you couldn't get it open. He says, "Well, can't get it open, so do it in the best way we can." He told me about having to report to get the door fixed. Never fixed it yet.

Q. Which direction was that train headed?

A. Going west.

Q. To where?

A. Towards Youngstown.

Q. What direction was your baggage truck?

A. West.

[fol. 22] Q. Where were you standing on the baggage truck?

A. On the back end of it.

Q. How many bags of baggage did you have on the baggage truck?

A. Twenty to twenty-five bags.

Q. And where were they located?

A. Towards the front end of my truck.

Q. That would be the west end of the truck, wouldn't it?

A. Yes, sir.

Q. Describe how you would place those bags on the baggage car?

A. Well, you get the bag, you pick them up, turn your leg, swing them around, push them into the hole.

Q. What was the width of the opening of the door as you were loading these bags into the baggage car?

A. 18 or 20 inches, whatever that is.

Q. How many bags did you have on the baggage—

A. Twenty to twenty-five. There were some carried through that day. The train brought it through, they took it to the post office and that night, the mail man brought it down. He says, they was carried through. You put them on 79 and send them back.

Q. What were the contents of those bags?

Mr. Mercer: I object unless he knows.

A. I don't open the sacks. I know different—bulky stuff. Some have weights heavier in the bottom than in the top, but I don't know what's in them. We are not allowed to open the mail.

Q. What was the weight of the bags?

A. Well, some are 25 to 50 pound. Some are 80 to hundred pounds.

[fol. 23] Q. Will you explain to us just exactly what you were doing at the time that you injured your back?

A. Well, the small ones I got through all right. The larger ones I had to twist around, and had to keep pushing and forcing them, trying to move stuff so it would go through the hole. Used a lot of pressure on them. Something snapped in my back. I didn't feel no pain. I kept on. Towards the end, after getting his mail out and towards the end, I tried to straighten up. I see there's something wrong with my back. Started hurting like the dickens, so I finish. I got off the truck and the guy works down at Wampum, Moffatt, he was standing right there. He got in back of my truck. I got in the front end. Was going to pull my truck over, after the train went. He got in the back and helped me across with the truck to get there. Then he helped me load the mail in the truck.

Q. When you got over to the station of the B&O station, what did you do then?

A. I went right in to report to the ticket clerk. He is my boss at night, Mr. Banks.

Q. What did he tell you to do, if anything?

A. He asked me if I could make it or wanted to go home. I says no, it's the hardest train I got. I will try to stick it out because I had some janitor work to do, I did, besides loading the trains. I did that, took my time. In the morning I had a couple of trains but they was not hard. So I got through and he told me to report to Mr. Boyd in the morning. I went home before Mr. Boyd came to work. So in the morning I called him up and I told him "I got hurt and Mr. Banks told me to call you up." I called him up and he tried to get me to come to work. I says, "I don't know if I can make it." So he says, "You come on out and we will get [fol. 24] you some help to help you work." So I took him at his word and I went out and tried to get along.

Q. Where did you injure yourself? Whereabouts?

A. In the small of my back here.

Q. That morning of October 15, 1956, did you have pain in your back?

A. After I got hurt, yes.

Q. Where was that pain located?

A. Well, in my back and it started going in my leg. I started limping, and I walked over in a kind of a crouch.

Q. What leg did it bother?

A. My left leg.

Q. And on the following day, did you return to work?

A. Yes, sir.

Q. Did you perform your usual duties that day?

A. I done the best I could.

Q. Were you in pain?

A. Yes, I was walking limping.

Q. Did you see a doctor?

A. They didn't send me to the doctor until four days after on the 19th. They sent me to a doctor.

Q. What doctor did they send you to?

A. Dr. Banister, because there's supposed to be another doctor I supposed to go to and they told me they're in convention for I should go to see Dr. Banister while they are gone.

Q. What did Dr. Banister do for you?

A. He talked to me and asked me how I felt. He asked me if I want to go home. I told him, they promised me some

help and I tried to stick it out because I had a vacation [fol. 25] coming in two weeks. So he gave me some pills to try to help me out.

Q. How long did you continue to work?

A. Until the 30th. I think the last day was the 30th of October.

Q. Did you have any further incident with your back while working during that period of about two weeks?

A. Yes, sir. We had a barrel of fire brick one night and it was real heavy and it was gone from No. 9. It was supposed to go for an engine to Willard because they needed bricks real bad to fix the engine. I tried to lift that barrel on No. 9 and I couldn't do it. I hurt myself more.

Q. During this period of time, did you have any help or assistance?

A. Mr. Banks got a chance, when he wasn't selling tickets, if he could get a chance to help me, he seen I was in misery so he helped me out.

Q. Did they provide any particular help, any additional employees?

A. No, sir, just what I could get ahold of.

Q. Did you complain about this?

A. Yes.

Q. To whom did you complain?

A. Complained to Mr. Boyd.

Q. What did he say to you?

A. He says, "I can't find anybody to take your place."

Q. Did you have any further incident involving your back before you finally left work?

A. I had a load of papers come in one night. That was towards the last day or night when I worked. They most generally come on two times, but this night came all at once. [fol. 26] I had to stack them papers on the truck, pile them up and put them away under the roof, where they keep the papers and I was bending. I had to bend over and keep them straight so get them all on. I bent over too far and something let loose in my back.

* * * * * * *

[fol. 33] Q. Would you tell us about the number of cars that you serviced during the course of an evening's work?

A. Well, there's five or six cars. I don't remember just right. I remember I had three or four, maybe four P & L E and I had a couple B & O cars. I worked different times. Some came in the morning and some came in the evening. Between time I'd have to do janitor work.

Q. About what would be the quantity of baggage you would have for each train?

A. Oh, they vary.

Q. Well, can you give us some estimate as to the quantity of baggage that you might have?

A. No. 9 takes quite a good bit. I worked two doors on that. He takes parcel post in one door and mail on the other door, mail car.

Q. On the other cars, what would you average, the number of bags or pieces of baggage that would be put on these various cars?

[fol. 34] A. Well, the morning one, it didn't take too much, maybe four, five and maybe a little bit come off. 79 was one of the biggest trains that I had to work. No. 9 on the B & O.

Q. What would you estimate the average weight of these pieces of baggage to be?

A. Well, some 25 to 50. Some of them 80 to a hundred maybe more.

Q. Would you tell us about how much time you had in which to load baggage on these trains?

A. You could do it in about five minutes. We'd get letters on it for delaying trains.

Q. Will you describe for me the station at B & O station and the P & L E station and tracks that are there?

A. Well, B & O station is one side and there's an eastbound and the westbound B & O track and across from the B & O station that's on the south of the B & O station is the P & L E station. It's between two tracks, eastbound and westbound.

Q. How many tracks are there immediately in front of the B & O station?

A. There's one right close and there's a little space and you go over another track. That's two B & O has.

Q. When you would take your baggage truck over, what direction would you take it?

A. South.

Q. South. About how many feet was it from the B & O station to the P & L E station where you placed your baggage car on?

A. Oh, around 75, 80 feet, I suppose.

* * * * * * *

[fol. 36] Q. Will you explain for me just exactly what you were doing at the time that you were putting this bag into the baggage car the morning of October 15th at 12:25 a.m.?

A. I was trying to wiggle around, trying to force the bag in, moving this way and shifting the sack and using a lot of force. Some got little packages in there, like you have to try to move it this way so it will go in this side and you try to move around this way so it would go in this way.

Q. What was the weight of this bag, do you know?

A. That's one of them large sacks.

Q. What would you estimate the weight of that bag to be?

A. Oh, it's 80 to a hundred pounds. I had three or four of them kind to get in there.

Q. As you were putting this bag into the opening, the 20 inch opening on the car, what occurred?

A. I felt a snap in my back and I didn't feel no pain. I kept on working. I didn't feel the pain until I tried to straighten up.

Q. When you tried to straighten up, did you feel any pain at that time?

A. Felt a pain in my back and went down my leg.

Q. Were you able to straighten up?

A. No.

[fol. 37] Q. Will you describe the manner in which you walked?

A. I was leaning over, like leaning over a little bit. I couldn't walk straight. I had to walk a little crooked.

Q. You say that Mr. Moffatt was there on that occasion?

A. Yes, he worked Wampum and he got off the train and he always wait until I get mail there when he worked that turn and he'd help me across the tracks.

Q. Do you know who the baggageman was on that car?

A. I don't know them people's names. None of the cars, their names.

Q. Do you know the name of the other person who was on the baggage car?

A. All I heard is Beck.

Q. While you were putting baggage into the baggage car, did you have an opportunity to look into the baggage car?

A. Yes, seen my mail, what I got was piled against the door, because I can look in the car. It's all floor there.

Q. Will you tell me who Mr. Boyd was?

A. He was ticket agent for the B & O.

Q. Was he your superior?

A. He is over all of us.

Q. He was your boss?

A. Oh, yes.

Cross examination.

By Mr. Mercer:

Q. When did you first go to work for the B & O?

A. May the 11th, 1951.

[fol. 38] Q. What was your position at that time?

A. That time I got a job in the storage department.

Q. You were first injured while working for the B & O back in November the 19th, 1951, weren't you?

A. Around there. November, December I got injured, yes. I strained this sciatic nerve.

Q. And you were off work until March 13, 1952, weren't you?

A. No, sir.

Q. When did you go back?

A. I kept on working.

Q. You say you kept on working after November 19th?

A. Yes, sir, I kept on working.

Q. You didn't lose any time?

A. No, sir, till—I was doctoring but I was working. They sent me to Akron to Roberts and he said you go down and see Mr. Pinelli and I will tell him what to do.

Q. You kept on working that whole time?

A. Unless there was a furlough in between there. I don't know. I worked every time they had work till they made me take off. In fact, they had a furlough coming up and they put me on sick leave because I was a young man there,

they had to furlough me so they put me on sick leave. That's why they done that.

Q. When did you go to work at New Castle?

A. Station?

Q. Yes.

A. It was around March of '56. I bid the job in.

Q. What was your shift?

A. When I went over there, we worked two fellows on the afternoon.

[fol. 39] Q. What shift did you work? Did you rotate or did you work—

A. No.

Q. Or did you work the night shift?

A. There was no midnight shift then.

Q. What shift were you working in October of '56?

A. Well, I think I was working the last trick, last shift, 5:30.

Q. What time did you go to work on October 14th?

A. Well, there was midnight turn. They made three turns, instead of having two guys come in the afternoon, they made three turns. One man in the afternoon, one at midnight and one in the day time.

Q. What time did you go to work on October 14th?

A. Eleven o'clock.

Q. Was that the third trick?

A. Yes, eleven to seven.

Q. Eleven to seven?

A. Yes.

Q. How long had you been working that trick or turn or shift prior to October 14th?

A. Since July or June, around there. I don't remember the date. I know they made three turns and I bid the midnight.

Q. You worked that turn since June, is that correct?

A. June or July, I don't know.

Q. Did you always work that trick alone?

A. Yes.

Q. What were your duties during that period of time?

A. Baggageman, caller, janitor.

Q. How many trains did you have to take care of during—

A. As I say, around five to six.

[fol. 40] Q. Five or six?

A. Some in the evening and some in the morning. Between time, I did the janitor work. That's why they made third furn, so didn't have enough trains so they give them janitor work to do.

Q. Between eleven o'clock at night and seven in the morning, do you know how many trains you had to service?

A. That's a long time, four years and a half ago. 79, No. 9, No. 18, or 17, and one came in P & L E in the morning, ten minutes to seven it got in. I don't know whether it came from Buffalo or where.

Q. How many were there?

A. Five or six. I can't just remember. Five or six for sure.

Q. So you were the only baggageman on at that time?

A. There was only one man on each turn at that time.

Q. You also did janitor work?

A. Yes, sir, both stations.

Q. What kind of a station was the B & O station at New Castle?

A. Passenger station.

Q. Where you were working?

A. Passenger station.

Q. What was the platform like? Was it a nice platform?

A. Well, they got one place is bricks. One is Pinchot. Over there is cement. They got three there. They had asphalt in between the tracks.

Q. A good platform?

A. Well, wasn't good there for a while. Then they—

Q. In October of '56?

[fol. 41] A. It was rough, going over them. Rough, bumps. You bounce the tracks. If you hit the tracks you'd bump.

Q. When you went out to this Train No. 79 that night, was the train already in when you pulled your baggage cart up?

A. I got over there, I set my truck there. I wait till the train stops. I tried to get near where I think the door is going to be where he stops.

Q. What did you do this night?

A. I waited till the train come in. Had the truck there I just pulled up a little bit by the door and lock it. Little grade there.

Q. Did you talk to the baggage man inside?

A. Did I talk to him inside? I didn't go inside the car.

Q. Did you talk to him?

A. I told him.

Q. Did you talk to him?

A. Yes. We talked. He said, "We can't get this"—

Q. This was the baggage car where you were going to throw in some mail?

A. Yes.

Q. How wide did you say the door opened?

A. About 18 or 20 inches is all I can say, to my estimation. I know the sacks wouldn't go through, all the sacks wouldn't fit through, I know that.

Q. About how many—you said you had about 20 to 25 pieces of baggage on your cart, is that right? That would be about a third of that cart, is that correct?

A. No, you don't just—how you pile them.

Q. How did you pile them that night?

A. I piled it back about this far from the end of the truck. [fol. 42] We never pile them too high, just how much you got. When you got a big load, you pile them way high.

Q. What did you say to the baggage man inside?

A. I told him we was talking there about the door. I says he ought to get it fixed. He told me he had a report in on the door to get it fixed. Never fixed it yet.

Q. Then what did you do, pick up the canvas bags you had in your truck and put them in the opening?

A. Some, get ahold of them, turn around, put them in the opening.

Q. Then he picked them up and put them in?

A. No, I pushed them and he's drag them back, pushed them around the corner, get ahold of them and drag them back.

Q. Is that the way you loaded the bags from your cart on to the baggage train?

A. When the door is open, you can stand right on the truck and pitch them straight there. Pitch them right inside.

Q. Is that what you did this time?

A. No, I had to turn them around to put them in.

Q. Is that how you put them in?

A. I had to. Only way I could get them in.

Q. Actually you don't know which particular piece of bag or baggage caused anything on you?

A. I don't know what bag I got hurt on. In fact, I got a little snap. I didn't even feel no pain. I don't know which bag done it.

Q. You don't know what bag?

A. One of them big ones. That's all I know. I don't know which bag. One of them big ones.

Q. That's all you remember about that, isn't it?

A. I wasn't even thinking about nothing like that.

[fol. 43] Q. Do you know how many bags you had left in your cart when this happened?

A. Well, I don't know. I didn't count them. I don't know.

Q. Do you know how many bags you had already put on the car when this happened?

A. I had a good many bags in. I didn't have too far to go.

Q. You don't know which particular piece of baggage did it?

A. No, sir. I don't know which bag done it because I wasn't expecting anything like that.

Q. Prior to this date of October 15, 1956, they never had any help, did they, to load baggage?

A. Two guys used to work them trains when they's on the other afternoon turn. Always two guys.

Q. That would be at the afternoon shift?

A. After they changed the shift, they only had one man doing it.

Q. How many men would work one opening? One?

A. One man.

Q. There's only room for one man on one cart like you had?

A. That's all, one man works one opening: used to have two men because you have two doors on a lot of cars. One go with the mail and the other one come back with the parcel post. Work the same time so the train wouldn't be late. That's why they have the two men.

Q. Actually each baggage car had two door openings?

A. This one had one big door in the middle as I remember.
[fol. 44] Q. So on a baggage cart like you had, only one man could work at a time?

A. There's only one man on a truck.

Q. You knew Mr. Moffat, did you not?

A. I met him a little short while before I got hurt because when I took the midnight turn he worked at Wampum. That's how I got acquainted with him because I used to give him a ride once in a while up the hill. That's how I got acquainted with him because he's going up on the east side.

Q. You never requested or said anything about additional help prior to this accident, did you?

A. Who?

Q. You?

A. There was some talk at one time when they took the two turns off. They went to the union and the union said there's nothing they could do about it.

Q. But you didn't request any help prior to this accident of October 15th, '56, did you?

A. No, I was getting along. I done my work. I was doing my work.

Q. Following this after you got your mail aboard, what did you do then?

A. The baggage man started handing his out to me. I was getting them and I'd take them and start piling them in front of the truck.

Q. How many pieces did you take off?

A. Oh, 10, 12, 14, something like that.

Q. So then after you got your 20 to 25 pieces on, then he handed out the mail that was for New Castle?

A. That's the way he worked it.

Q. Then where did you deposit that mail?

A. On the truck, same truck I unloaded.

[fol. 45] Q. Then where did he take them?

A. Across the tracks, same way again to the station, backed the truck into the station. There was a mail truck from the city, waiting to take that mail back to the post office.

Q. Did you help unload it?

A. Mr. Moffat helped me unload it that night. I helped unload it the other times. Always that was my job to hand

it to the mail man, he'd take it and throw it in the truck and stack them in there.

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[fol. 53] By the Court:

Q. Who paid you, what company?
A. B & O.
Q. Did you ever get paid by the P & L E for any work?
A. No.
Q. Never?
A. They didn't pay me, no.
Q. You said you did janitor work?
A. Yes, sir.
Q. At what station?
A. Both stations.
Q. Both stations?
A. P & L E and B & O.
Q. What did that consist of?
A. Well, to keep the floors clean, you had to scrub them two times a week and keep the paper off the windows, stuff off and keep the benches all clean so the people can sit down. They won't get their clothes dirty.
Q. The B & O paid you for all that work?
A. That's right, that's where I got my checks, from the B & O.
Q. You stated you called trains. You were a caller?
A. Not call trains. I had to go call the men. They was called out for an engine, like brakeman or fireman, they called up the station. Ticket agent would go tell me to call a man to work. He might be living in a hotel or house up the street. I'd take a book with me and go see the man personally and go to see him. If he'd gone to work, I'd have to [fol. 54] mark o.k., he's o.k. to go out to work. I'd have to go back and call the ticket agent everything is all right. Then he'd call in and say he can come to work.
Q. That's what you mean by being a caller?
A. Yes, sir.
Q. You did not call the trains?
A. No, no, no trains. People.
Q. Did you ever call people that worked for the P & L E Railroad?

A. No, just B & O. That's all I know.

The Court: Anything else?
Mr. Ruffalo: I have nothing further.

A. I wanted to say something.

The Court: You can talk to the lawyer if you want to say something. You don't need to talk out loud. It might not be the right thing. Sometimes a witness wants to say something that's the wrong thing and that's the end of the trial. It's tried all over again. We just want to protect you from that. Go ahead.

By Mr. Ruffalo:

Q. When you make these calls, will you explain who you called?

A. I want to get the man that he told me now. He worked for the railroad. I don't know where the call came for him where the man worked.

Q. Do you know whether it's a call for a B & O employee or P & L E?

A. No, that's what I mean. He told me to go get this man for the railroad. I don't know whether they called, they are called there or not.

[fol. 55] Q. You don't know whether it's a B & O man or a P & L E man?

A. No.

By the Court:

Q. Who told you to get them?

A. Ticket clerk.

Q. That's the B & O boss?

A. Yes, he was ticket clerk with the boss. Main foreman, he worked day time, all the time.

Q. That's Mr. Boyd?

A. Yes.

Q. Maybe we can find out from him.

A. O.k. Mr. Banks ought to know what that is.

The Court: We will recess until tomorrow morning. Is it convenient if we recess now until tomorrow morning?

Mr. Ruffalo: It is for me.

The Court: We will recess until tomorrow morning and ask you to be in your places at ten o'clock. Jury may retire.

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Morning Session in Chambers

Tuesday, April 18, 1961

Colloquy Between Court and Counsel

The Court: Gentlemen, there seems to be an inconsistency in this case or I just don't understand it. In the P & L E answer and the stipulation read to the jury it seems that the P & L E Railroad was authorized by contract with the B & O to use the facilities of the B & O station at New Castle, for taking on and discharging passengers and load-[fol. 56] ing and unloading mail and baggage. That's what you have stipulated, but the proof shows as Mr. Ruffalo stated in his opening, that the plaintiff was employed by the B & O as a baggage man at the New Castle Station where there were two tracks of the B & O trains and two tracks for the P & L E trains and the B & O employees serviced the P & L E trains at the B & O station.

The evidence indicates that there were two stations in New Castle, one for the B & O trains and one 75 to 80 feet south of the B & O station for P & L E trains. Now, what is going on here? Are there two stations?

Mr. Ruffalo: Yes.

The Court: How come you stipulated?

Mr. Wright: Only one ticket office.

The Court: You don't say that. You don't even mention the ticket office. You say that the P & L E Railroad Company was authorized by contract with the B & O to use the facilities of the B & O station at New Castle for taking on and discharging passengers and loading and unloading mail and baggage. You gave me to believe that there was one B & O station with B & O tracks that the P & L E was using. Now it turns out entirely different. What is the fact?

Mr. Ruffalo: The facts are to use the facilities in so far as the baggage trucks are concerned, so far as the baggage men and the employees and the ticket office, they use the

station for their passengers to wait in and so forth like that, [fol. 57] where the other station is practically closed. It only has a light on the door at night. There's no service there of any kind. The people get off—the trains come in on the P & L E track. All P & L E trains come in on the P & L E tracks. They take on passengers off the P & L E loading platform and discharge them. They take off mail and put on mail on the P & L E platform, but all the facilities of the operating facilities are the operating facilities of the B & O Railroad.

The Court: Why don't you stipulate there were two stations there? One was a P & L E station serviced by P & L E tracks where P & L E passengers got off and where baggage was loaded on. You don't have any mention in this stipulation about two stations. You gave me to believe that all this was on the B & O station, on the B & O tracks. Your stipulation indicates that.

Mr. Wright: Fred, do you agree with the facts as John has outlined them? Is that your understanding?

The Court: Counsel is completely irresponsible to the Court in the stipulation where the facts were so plain as apparently they are. You misled the Court. You give the Court a false impression.

Mr. Ruffalo: I am sorry about that, Your Honor. That was not my intention in any way. Of course, I had raised a question about the contract existing and agreement existing between these parties.

The Court: They weren't using the facilities of the B & O station at all. They were using their own facilities, their own track, their own station.

[fol. 58] Mr. Wright: They are using the waiting room and ticket station.

The Court: That is not the point. You don't even tell me there's two stations. You don't even tell me there's two P & L E tracks. You don't even tell me the P & L E was using its own station and own tracks. The baggage was being loaded at the P & L E station. The train was on the P & L E tracks. None of that stuff is disclosed anywhere. In fact, the whole tenor of the answer, the whole tenor of the stipulation is that they were using B & O facilities, to wit, the station, the B & O tracks, B & O baggage man, B & O

truck. No mention that he had to cross 80 feet from the B & O to the P & L E station or where the P & L E train was. It seems to me very easy to have stipulated the actual facts in the case. I am inclined to continue the case and order another pretrial.

Mr. Ruffalo: Inclined to what?

The Court: Continue the case and order another pretrial, where you set forth these things that we know were going on. It burns me up that facts apparently as easy to stipulate as that are just hidden from the Court. I had no idea until that man took the stand that there were two stations up there.

Mr. Wright: I don't know. Is that station in use at all?

Mr. Ruffalo: No.

Mr. Mercer: I join in your motion.

The Court: It would be at your cost, at your cost. You are the fellow that should have brought those out.

[fol. 59] Mr. Mercer: I chanced that.

The Court: Sure you did. You entered into the stipulation.

Mr. Mercer: May I have a few minutes? I'd like to find out from Al Williams what the facts are. Can I have a minute?

Mr. Wright: I believe the defendant prepared the stipulation.

The Court: The only people that would know about it, although you people ought to have known there were two stations, two sets of tracks.

Mr. Mercer: Let me ask Mr. Williams if the situation is the same up there as it is in Pittsburgh.

The Court: Well, I don't know.

Mr. Mercer: I'd like to ask Al if it isn't the same situation up there as it is up here.

The Court: Let's get the jury.

Mr. Mercer: We had a B & O station.

Mr. Ruffalo: Are we going to go ahead or withdraw the juror?

The Court: What do you think I ought to do?

Mr. Wright: Judge, I don't think anybody is too hurt.

The Court: I am quite disgusted with all of you.

Mr. Wright: They did use some of their facilities, but they did use their own tracks. Apparently the station is in misuse.

[fol. 60] The Court: I just point out how confusing you have been. Pretrial is to give a trial judge an idea of what the facts are, the undisputed facts, at least.

What we will do, I expect a stipulation on the full facts existing up there to be in writing and hand it up to me at two o'clock. We have the lunch hour. We will adjourn a little early so you will have time to prepare it.

We will strike out that inconsistent stipulation which I think is No. 4 in your pretrial stipulation and substitute the one you prepare today which will be in accord with the evidence and will specifically and in detail tell the jury and *me* about those two stations and those two tracks and all other relevant details that are undisputed. Is that all right? We will go on.

Mr. Ruffalo: Can we have the right to read that stipulation to the jury if it is amended or not?

The Court: If it is stipulated certainly it will be read to the jury.

In Open Court

Richard H. Moffatt, a witness in behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Ruffalo:

Q. What is your name?
A. Richard Moffatt.
Q. Where do you live?
A. 121 Richlieu Avenue, New Castle, Pa.
Q. Where are you employed?
A. I was unemployed.
[fol. 61] Q. Where were you employed?
A. Furloughed from the P & L E Railroad.
Q. Are you furloughed at the present time?
A. Yes.

Q. What was your capacity with the P & L E Railroad Company on about October of 1956?

A. I was relief ticket clerk at the time.

Q. Where were you stationed?

A. I used to work four days at Wampum and one day at Beaver Falls. I'd work two days day turn, two days afternoon turn and one afternoon turn would be revolved.

Q. How long had you been employed as relief station agent at Wampum?

A. I couldn't say all together. I have been jumping around from New Castle to Wampum, Ellwood City, like that, all the time for 13, 14 years.

Q. What trick did you work?

A. I worked two days day turn, two days afternoon turn and one day Beaver Falls afternoon turn.

Q. What hours of the day did you work?

A. Usually be about four, four-thirty to twelve-thirty.

Mr. Mercer: At what period of time, what year?

Q. During the year 1956 or specifically October of 1956.

A. That would be along about 4:30 to 12:30.

Q. That would be 4:30 p.m. to 12:30 a.m.?

A. That's right.

Q. On October 15th, were you working as the relief ticket agent at Wampum?

A. That's right, ticket clerk, that is.

[fol. 62] Q. Will you explain what you did that evening after you ceased your employment at 12:30 a.m.?

A. I rode up in the last train from Pittsburgh and got off at New Castle, Pa.

Q. What train was that?

A. No. 79.

Q. That gets into New Castle?

A. That is a regular scheduled time but the mail would be late five, ten minutes along the line. It could vary half an hour, an hour sometimes.

Q. When you arrived in New Castle, what did you do?

A. Well, I usually rode up with the mail man or rode up with the baggage man. Depends on which one I could get because there was no bus service there from New Castle. They had discontinued that in evening service. I got off the

train and I'd walk up to the baggage coach and watch the mail unload there.

Q. Do you recall who was working as baggage man at the Mahoningtown station that evening?

A. Mike Shenker.

By the Court:

Q. What?

A. Mike Shenker, whatever it is. I can never pronounce it. Mike anyhow.

Q. You were working with the plaintiff here, is that right? Is that what you mean?

A. Yes. No, he was working on the baggage car. When I come off the train I walked up to where the baggage cart was being pulled against the coach and loading the mail in. I can explain further if you want me why I was up there, if you want me to tell you.

[fol. 63] By Mr. Ruffalo:

Q. Go ahead, explain if you wish.

A. All right. I went up there and always on account of the train would be pulling across the crossing. I had to go down through the tunnel and through other way. We always wait until that train would pull out and take the baggage cart across. I'd help them push that cart across the tracks, because after it was loaded in the mail truck, I used to ride up with the mail truck, New Castle, about three mile.

Q. Did you see Michael Shenker loading bags on the baggage car that morning?

A. Yes, sir.

Q. Did you see how many bags were on his truck at that time?

A. Oh, I'd say roughly by the time I got up there, would be 20, 25.

Q. Did you observe the car door, the baggage car door?

A. Yes, sir.

Q. What would you say was the width of the opening of that car door?

A. Well, I'd say roughly about that far. I'd say maybe 20 inches, 24, around in that neighborhood.

The Court: I can't hear.

A. 20 inches, 24.

Q. Did you observe the size of the bags which were being loaded on the baggage car?

A. Well, not particularly. Only just the ones they'd be putting by the door. I paid no attention to them. Most of them were ordinary small sizes. A few large ones.

[fol. 64] Q. After the baggage was loaded and the mail was taken off the baggage cart, did you observe Mike Shenker?

A. Yes, sir.

Q. Did you see anything unusual at that time?

A. Well, he started to get off the truck. He says, "I hurt my back" and he held like that there (indicating).

Q. What did you do then?

A. Well, he got on the front end of the truck and I got on the back end of the truck. We pushed it over to the three tracks over to the mail truck. I unloaded what was on the back of the trucks to the mail truck and I rode up with the mail man.

Q. Did you see Mike Shenker any more that morning?

A. No, sir.

Cross examination.

By Mr. Mercer:

Q. When you got off this train, Mr. Moffat, where did you go?

A. Went up to the baggage cart. Walked up along about two or three coaches.

Q. How many carts did you see out there?

A. Well, there's one alongside the train.

Q. How many men—had you ever done this before?

A. Yes, sir.

Q. How many men would work one cart?

A. One man.

Q. Did you observe the baggage cart itself?

A. Yes, sir.

[fol. 65] Q. And about how filled was it?

A. I'd say about a third.

Q. Were you just standing there as this baggage cart was being loaded onto this train?

A. That's right.

Q. I presume the baggage cart itself was up against the side of the train?

A. That's right.

Q. I also presume that Michael Shenker was on the baggage cart?

A. That's right.

Q. And did you observe what he did?

A. He was throwing mail into the coaches, into the mail truck or the mail car.

Q. You state he was throwing mail from the cart into the coach?

A. That's right, into the baggage car.

Q. Baggage car?

A. That's right.

Q. Did he just place these sacks or bags up on to the opening?

A. Small ones that are just flat why he just tossed them in. The ones that were a little larger than ordinary, he'd stand them on the end and push them over.

Q. Push them over where?

A. Into the truck.

Q. Is that all he did?

A. Yes, sir.

Q. Are you able to judge or tell us whether this was normal procedure?

A. Well, for the door being open like that, that was about the only way you could handle it. Ordinarily you'd throw [fol. 66] it in maybe sideways, that's all, but it's normal for the condition the way the door was there open.

Q. You didn't notice anything abnormal about this procedure?

A. No, sir.

Q. Did you know Michael Shenker before this incident?

A. Well, all I know since he worked down at this B & O Railroad, coming back and forth there would pass him. I knew him there for possibly maybe six months. I used to

ride up home with him at night and I knew him well enough we used to discuss his back injury on the way home.

Q. Discussed his back injury?

A. Yes, sir.

Q. Was this prior to this accident?

A. Yes, sir.

Q. You mean he discussed the back injury, is that since 1951?

A. Well, I couldn't state any date or particular time at all, just telling me about the condition he was in.

Q. About how many times would you have ridden with him?

A. Oh, I'd say 10 or 15 times all together.

Q. Would this be prior to the date of this particular incident October 15, 1956?

A. Yes, sir.

Q. Do you know when he came to work on this particular shift with the B & O?

Mr. Ruffalo: I object. This is not particularly cross-examination. It wasn't brought out in chief.

[fol. 67] The Court: Sustained. That's not proper cross-examination. If you want to make this man your witness, you can call him later.

Mr. Mercer: I have no other questions.

Redirect examination.

By Mr. Ruffalo:

Q. Were you subpoenaed by me to come in and testify?

A. That's right.

Q. Thank you.

By the Court:

Q. Mr. Moffatt, then you rode up from Wampum on a P & L E train?

A. Yes, sir.

Q. Was that train running on P & L E tracks?

A. Yes, sir.

Q. And it stopped at the P & L E station?

A. At New Castle. It is a combination, P & L E and Wampum or P & L E and B & O. They call it New Castle.

Q. Do I understand there are two stations there?

A. Well, one is a waiting room and the other is a station but the station that the B & O sells tickets for both P & L E and B & O.

Q. Yes, but the B & O station is a separate building from the P & L E station, is that it?

A. Well, it is up in respects to waiting rooms but not on the ticket office.

Q. There are two buildings there?

A. Yes, sir.

[fol. 68] Q. One on one side and one on the other side?

A. Yes, sir.

Q. One of them is the P & L E building, the other is the B & O building?

A. Yes, sir.

Q. They sell tickets at the B & O building for both trains?

A. That's right.

HARRY LEWIS BANKS, a witness in behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Ruffalo:

Q. Will you kindly state your name?

A. Harry Banks.

Q. Where do you live?

A. I live at R. D. 6, New Castle, Pa.

Q. Where are you employed?

A. I am employed at the New Castle passenger station by the Baltimore & Ohio Railroad.

Q. And were you employed by the Baltimore & Ohio Railroad Company in October of 1956?

A. Yes, I was.

Q. How long have you been in the employment of the Baltimore & Ohio Railroad Company?

A. Thirteen years.

Q. Do you recall the morning of October 15, 1956?

A. I do.

Q. Can you tell us what occurred on that morning in respects to Michael Shenker?

A. After No. 79 left, approximately 10 minutes, Mr. Shenker came into the ticket office and told me that while [fol. 69] working No. 79, he hurt his back and I asked him if he thought it was serious enough that I would call the company doctor or take him to the hospital and he told me that he thought that he'd sprained his back and he would try to finish the night out and see how it turned out.

Q. Did he finish out the rest of his tour of duty?

A. Yes, he did.

Q. Did you advise him to report this to anyone else?

A. I advised him if his back gave him any more trouble to report this to Mr. Boyd who was the daylight ticket agent.

Q. And what time did Mr. Boyd come on duty?

A. Mr. Boyd came on duty at seven a.m. in the morning.

Q. When Mr. Boyd came on duty, did you make any report to him regarding Michael Shenker?

A. Yes, I did. I gave him a written report.

Q. Did you observe the number of bags that were on the baggage truck?

A. No, I didn't. I don't go outside to see the operation of that mail. I was in the ticket office where my duties called for my line of work.

Q. Do you have enough knowledge to be able to describe what one of these baggage trucks are like?

A. Yes, I do.

Q. Would you describe them?

A. The baggage truck is a four-wheel iron wheels on it with a tong which you pull and you can steer and it has a chain on the rear wheel which you can lock to keep the truck from running away in case of wind or in case if the platform was a little down grade. While unloading the mail, you can lock the train and hold it there.

[fol. 70] Q. Have you had an occasion as ticket agent to observe Michael Shenker working?

A. Yes, I have.

Q. And prior to the date of October the 15th, 1956, did you see Michael Shenker lifting mail bags and other freight in the station there?

A. Oh, yes.

Q. Could you tell us about what the weight of some of these objects would be that he lifted?

A. Well, you mean U.S. mail or baggage or—

Q. Yes, anything at all?

A. Well the U. S. mail, as I understand there's a limit of 83 pounds to the weight of mail sacks. Of course, it could vary anywhere from five pounds up to the 83 maximum pounds and it's possible that it would go heavier than that if a postal employee was careless of loading sacks and got more in the mail sacks than he should have.

Q. How long had Michael Shenker worked on this at the time you were working there?

A. He'd worked approximately four months up to the accident.

Q. And at any time during that four months' period, did you ever hear any complaint of his back?

A. No, sir.

Q. How much time did a baggage man usually have in which to load one of these baggage cars as they come in the station?

A. There's no set time limit at all. The train will lay at the station until the work is taken care of. They can't leave without the U. S. mail.

Q. That's if a mail car is on the—

A. Well, it don't have to be a mail car. A mail car is an R.P.L. car which is postal employees. Then they have a [fol. 71] baggage car that they handle fourth class mail. Regardless of what type of car it is, the train has to lay at the station until the mail is all received and then all the mail is taken off that goes to the station.

Q. What do you mean by R.P.L.?

A. An R.P.L. car is a car that's maintained by the United States Government. It has postal employees working right in the car sorting mail and distributing it along the line the train goes to make connections with other trains. It's just like a post office.

Q. Do they have such a car on the No. 79?

A. No, sir, there was not such a car on that train at any time that I could ever remember.

Q. What type of car do they call the one No. 79?

A. That would be called a baggage car.

Q. Would you describe that for us, please?

A. Well, the average baggage car is a car that has two doors on each side of it. All together it has four doors. It would have two doors on the left-hand side and two doors on the right-hand side.

Q. On occasions when you have both a mail car and a baggage car in a train, is the baggage man required to handle both cars?

A. Yes, sir.

Q. What would you say as to the ability of Michael Shenker to perform work prior to October 15, 1956?

A. Well, my observation was that he was a very good worker.

Q. Did he appear to be strong and healthy?

A. Yes, he did.

Q. Was he a willing and reliable worker?

A. He was all the time he worked with me.

[fol. 72] Q. Now, after the date of his injury, did Mike Shenker return to work?

A. Yes, he did. He worked approximately two weeks after the injury. He worked till October 30th of 1956 was his last night that he worked with me.

Q. Will you describe his appearance on those occasions?

A. Well, I observed that he was walking around humped over, claiming that his back was bothering him.

Q. Did he ever complain to you about his back after October 15, 1956?

A. Yes, he did.

Q. Do you have any knowledge of his hurting his back while working during the period of October 15 and October 30?

A. You mean after the first injury?

Q. After the first injury?

A. No, sir.

Q. Do you know the reason for his quitting October 30, 1956?

A. Well, other than what he told me, that his back was bothering him so much that he could no longer perform his duties.

Q. Have you had any experience in loading and unloading baggage?

A. Yes, sir.

Q. What is the approximate size and weight? I have asked you that before. I will withdraw that. From your knowledge, what would be the contents of these bags?

A. Well, U. S. mail they have what they call a lock pouch. That is a small bag with a lock on it that contains all first class mail, letters, registries, of any valuable origin. Then they have what they call fourth class which would be [fol. 73] a parcel post sack and it could be a magazine, sackful of magazines or circulars, things of that nature.

Q. Would they have any company equipment and material that would go on these baggage cars?

A. They have company material that would be shipped in baggage service but it wouldn't be in the mail bag. That would be loose.

Q. Would they ship any luggage on these cars?

A. Yes, sir, the railroad company has a baggage allowance where they will ship baggage on your ticket to your destination.

Q. How long did you work as a baggageman for the B & O Railroad?

A. I worked as a baggageman approximately two years.

Q. From your experience and knowledge, do you have an opinion as to whether the failure of the baggage car man to open the car door a sufficient width so as to permit the free and uncovered loading of the baggage was such as constituted a failure to provide plaintiff with a reasonably safe place in which to perform his work?

Mr. Mercer: I object to the question as incompetent, irrelevant and immaterial.

The Court: That objection is sustained. That is for you, ladies and gentlemen, to decide from the facts, not from this witness or any other witness.

Q. As a ticket agent, did you sell tickets for the B & O and P & L E Railroad Company?

A. Yes, I did.

Q. Was the passenger station used by both the customers of the B & O and the P & L E Railroad Station?

A. Yes, it was.

[fol. 74] Q. Since Michael Shenker ceased his employment with the B & O Railroad, did you have an opportunity to observe him walking about the streets of the City of New Castle?

Mr. Mercer: At what time? You mean since or before?

Q. Since I said. Since his injury, since quitting his work?

A. Well, sir, I haven't seen Mike for a long time up until the last few days.

Q. Well, when you saw him recently, would you describe his appearance and the manner of his walk?

The Court: Well, if he just saw him the last two or three or four days before the trial, I don't think we want that.

Mr. Ruffalo: That will be all.

Cross examination.

By Mr. Mercer:

Q. Is the mail on 79 at this particular trick light or heavy?

A. That mail was light.

Q. What would be the duties of Michael Shenker?

A. The duties of Michael Shenker was to work mail and baggage off the B & O and P & L E trains, to do janitor work, consisting of mopping the floor, dusting the benches, keeping the rest rooms in a clean and sanitary condition and to call engineers, firemen, brakemen or conductors to work that lived within one mile of the passenger station.

Q. Were you his boss?

[fol. 75] A. I was. I was his boss over that turn. I was not the boss of the station though.

Q. I have no further questions at this time. I will at a later time.

By the Court:

Q. Did Mr. Shenker call employees of the P & L E to work?

A. No, sir, strictly B & O employees.

Q. Was there a rest room in the P & L E station?

A. No, sir.

Q. Were there benches in the P & L E station?
A. Yes, sir.
Q. Was it open?
A. It was open to the public.
Q. Did the P & L E have any boss there that night?
A. No, sir, the P & L E didn't have any employees whatsoever connected with that operation there.
Q. Under whose supervision was Mr. Shenker?
A. He was under the ticket agent, Mr. Boyd.
Q. On that turn when he got hurt?
A. On that turn he was under my supervision.
Q. During the four months you say he worked there, did any P & L E employee give directions or orders to the plaintiff?
A. No, sir.
Q. From whom did he receive direction and orders, instructions?
A. From me or Mr. Boyd would let me know what he wanted done and I would tell Mr. Shenker.
Q. And you and Mr. Boyd were exclusively Baltimore & Ohio Railroad employees?
A. Yes, sir.

[fol. 76] The Court: Anything else?
Mr. Mercer: Not at this time.

Donald Runyon, a witness in behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Ruffalo:

Q. Will you kindly state your name?
A. Donald Runyon.
Q. Where do you live?
A. I live at 207 South Ashland Avenue, New Castle, Pennsylvania.
Q. Are you employed?
A. I am unemployed right now.
Q. Were you employed by the B & O Railroad in October, 1956?

A. Yes, sir.

Q. How long have you been employed by the B & O Railroad up until October of 1956?

A. Approximately three years in 1956.

Q. In what capacity were you employed by the B & O Railroad?

A. From February, 1956 for the rest of the year, I was employed as a baggage man.

Q. You were a baggageman working at the station in Mahoningtown, Pennsylvania?

A. Yes, sir.

Q. Did you have occasion to see Michael Shenker at the station?

A. Well, I worked right with Mike. The first part in 1956, he was working the three to eleven and I was work- [fol. 77] ing the eleven to seven and then I bid down into center yard, another clerical department. When I done so, Mike bid my 11 to 7 in. I bid back on to 11 to 7 shift. We switched turns in the middle part of 1956.

Q. During that period of time, did you have an occasion to watch Michael Shenker load bags and baggage on to the baggage car?

A. Not actual loading because he would work one turn, I worked another turn but he would either help me or in our turns I'd come out early if we had to take these papers across. It's too much for one man. Both of us would take them off or if heavy stuff to load, we would load it together before he went home or before I left.

Q. Do you recall that day that you worked down there at the station as a baggageman?

A. It was in the early part of October, I believe around the 8th.

Q. That was just about a week before Michael Shenker injured himself, is that right?

A. I believe he stated he got hurt on the 14th or 15th, so I would say it was approximately a week.

Q. During that period of time that you worked or overlapped your shifts with Mr. Shenker, did you ever hear complain about his back?

A. No; he never complained to me and I never noticed any physical, because he would—in fact, do heavier work than I would. He would have to help me.

Q. Did he always seem strong and healthy?

A. Yes, lik I stated, these papers we used to get, we would get off on the afternoon turn, they would be too heavy to take across. If I was on the 11 to 7 turn, I would come out early and we'd take the papers over together. If there was heavier company material or stuff to put on the [fol. 78] truck, why he would put it up on the trucks so I wouldn't have to load it.

Q. What would you say the weights or the approximate weight that he was able to lift?

A. I would say Mike could lift a hundred pound with ease. Now I am not saying that the objects were over a hundred pound, but from the estimation of the weights, I would say he could lift a hundred pounds with ease.

Q. Did you at any time service as baggage man Train No. 79?

A. In the early part of 1956, I did, because I was on the 11 to 7 turns.

Q. Did you ever have any experience with having any difficulty with the door on No. 79?

Mr. Mercer: Now just a minute, if the Court please. I believe this witness is listed in Mr. Ruffalo's pretrial narrative as a condition witness. I believe now he's getting far beyond the scope of his pretrial narrative statement. I'd request if he's going to proceed, that he make an offer at side bar.

The Court: The question as asked is irrelevant. Objection to that question sustained. If we come down to October 15th on this particular door, why we will let him testify perhaps. He wasn't there.

Mr. Ruffalo: He wasn't there.

A. No, sir.

The Court: Any other door isn't relevant to this case. We are interested only in this one door.

Q. Have you had an opportunity to see Michael Shenker after October the 15th, 1956?

A. Yes, sir.

[fol. 79] Q. Did you have an opportunity at that time to observe him?

A. Oh, yes, I have seen Michael several times.

Q. What would you say as to his manner of walk?

A. You couldn't even call it a walk because he could walk slow and it seems to me he's dragging one of his legs I wouldn't say which one. It's sort of a bent walk. A walk in pain is what I would call it.

Q. Did he ever complain to you about pain in his back after October the 15th, 1956?

A. Well, almost every time I seen him after he got hurt he always complained. Every time I seen him, you know, he'd always complain about his back that he couldn't straighten up or he'd ride a train, he'd say he couldn't sit up straight or something like that. He'd say he was in constant pain with it.

Cross examination.

By Mr. Mercer:

Q. Have you seen Mike Shenker very often since October of '56?

A. No, I would say since October of '56, I seen him—

Q. About four and a half years?

A. I'd say I've seen him approximately oh seven or eight times, that's over a spread of a period of time.

Q. How long have you been unemployed?

A. I was unemployed from the B & O in September of last year and they recalled me the last three weeks of December of last year to work and then I am presently on the extra list at New Castle junction. Whenever they get work, they call me. It's slow now. So I only worked one day about a month ago.

[fol. 80] Q. I have no other questions.

By the Court:

Q. Who paid you for your duties as baggage man?

A. I received my wages and a check from the B & O Railroad.

Q. Were you ever paid by the P & L E Railroad?

A. No, sir, all my checks were stamped Baltimore & Ohio Railroad.

Q. That's all.

* * * * * * *

MOTION FOR DIRECTED VERDICT, ETC. (P & L E)

Mr. Mercer: Coun el for the Baltimore & Ohio Railroad Company moves this Honorable Court to direct a verdict in behalf of the defendant, for the reason that no—

The Court: On behalf of which defendant?

Mr. Mercer: On behalf of the defendant, the Baltimore & Ohio Railroad Company, for the reason that no negligence against the Baltimore & Ohio Railroad Company has been proven as shown by the plaintiff.

The Court: It's very hard to see, but maybe the jury can see it.

Mr. Mercer: Plaintiff in this case testified that he picked up bags, placed them in the entrance way to the baggage car and that there were four heavier bags. He doesn't know which bag it was that caused a snapping sensation in his back. I fail to see that there is any hazard or duty violated by the B & O in this particular case.

MOTION FOR DIRECTED VERDICT, ETC. (P. & L. E.)

On behalf of the Pittsburgh & Lake Erie Railroad Company, counsel for the Pittsburgh & Lake Erie Railroad [fol. 81] moves this Honorable Court to direct a verdict on behalf of the P & L E Railroad for the following reasons:

First, this Court has no jurisdiction. There is no diversity of citizenship between Michael Shenker and the Pittsburgh & Lake Erie Railroad Company.

2. There is no dual employment, no control by the Pittsburgh & Lake Erie Railroad Company over Michael Shenker. His duties were outlined by the Baltimore & Ohio Railroad Company and he was paid by the Baltimore & Ohio Railroad Company and told what to do by the Baltimore & Ohio Railroad Company.

3: There is no duty, hazard, shown by the plaintiff against the Pittsburgh & Lake Erie which was violated in this case. There is no actionable negligence against the Pittsburgh & Lake Erie Railroad Company; therefore counsel moves for a directed verdict in favor of both defendants.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: I can't see any negligence in the case. What do you say it is?

Mr. Ruffalo: I say, Your Honor, and the fact of the faifure to open the door a sufficient width and permit him to load the bags on to the baggage car and that these bags were of a large size, although he says that he doesn't know which ones of the bags, of course, they didn't have tags on them or numbers on them that were to identify them. He did testify to the fact that one of the heavier bags, one of the larger bags that he had to shove through the small opening there of 20 inches and when twisting and turning, [fol. 82] he injured himself, he recalled a snapping condition in his back and that the negligence was there in view of the fact that the railroad company, the B & O Railroad Company or its employees and agents has a continuing duty to provide a safe place in which to have its employees work and it isn't an intermittent one and he does not assume the hazards of the job, whatever they may be and he is not charged with any contributory negligence on his part.

I feel that there is ample evidence here brought forth by Mr. Shenker and corroborated by the witness Moffatt as to the fact that this door was not open a sufficient width in order to permit him to put these bags in easily and freely.

The Court: Why didn't he open it?

Mr. Ruffalo: He stated he tried to open it and he couldn't. The testimony was he put his hand up on the door and pushed on it and couldn't open it and that he asked the baggage man and the baggage man told him that the door wouldn't work and that to go ahead and put the baggage on anyway.

The Court: Well, you mean he went ahead and put the baggage on anyway?

Mr. Ruffalo: Yes.

The Court: That was his job.

Mr. Ruffalo: That was his job to do, regardless of the particular hazard. He didn't assume it.

The Court: What was dangerous? What was unsafe about a door that will only open 20 inches?

[fol. 83] Mr. Ruffalo: Well, there may be nothing unsafe about the door itself, its being opened that width, I mean. The fact is you had to put the bags through that weighed a hundred pounds or which were considerable size and bulk which would not go through this opening and which had to be pushed through and shoved through and then pushed to one side in order to get them in there. Otherwise, normally all they did prior to that time was just take them and lay them up on the edge of the floor of the car and shove them in. They didn't have to lift them and pick them up and shove them through a small space.

The Court: You have to pick them off the car and put them on, put them on the floor of the baggage car.

Mr. Ruffalo: The baggage car and the floor of the baggage truck. There's only a difference of about eight inches, six or eight inches.

The Court: I heard no such difference in the testimony.

Mr. Ruffalo: All they do is just lay them over, flop them over and then shove them in.

The Court: What is so dangerous about this? That was the point. How can you translate a door that will open only 20 inches into an unsafe place to work? Nothing unsafe about it.

Mr. Ruffalo: It's unsafe in view of the fact it isn't open sufficient to permit the baggage to flow through freely and this man had to shove them through. He had to exert a pressure and a force that he normally didn't have to use, that he normally didn't have to go through there.

[fol. 84] The Court: All I can see is a defective door. Nothing unsafe about it at all, I can see. Nothing dangerous or hazardous. It wouldn't open. It's not like having oil on the floor or big stones in the cartway or some dangerous condition. I don't know how you can translate a defective door into a dangerous, unsafe place to work.

I can see though that if the defective door played any part in causing this man's injury and the defect was due to the negligence of the defendant—

Mr. Ruffalo: We claim that the door was defective, too, in view of the fact it wouldn't open.

The Court: That's all that is in the case.

Mr. Ruffalo: Yes.

The Court: If the defective door played any part in causing injury to this plaintiff and the jury can find that the defect was due to the negligence of the defendant, then they are liable. I think maybe you have enough to go to the jury on that score. I can't for the life of me see how a door that will open 20 inches creates an unsafe place to work.

Mr. Ruffalo: I think it does, Your Honor, in view of the fact they had large bags to stick through a narrow space and had to force them through.

Mr. Mercer: That wasn't the testimony he forced them through. He stated he put them up there on the edge and baggageman inside picked them up and took them away.

The Court: I heard twisting and reaching around to get the bag to put it up and that's when his back snapped.

[fol. 85] Mr. Ruffalo: He testified he had to shove them through, the larger ones. The smaller ones he just threw it in.

The Court: He didn't say when he was shoving them through that his back snapped. He said he turned to the right and lifted it up and that's when his back snapped. It had nothing to do with the door. You say he was shoving it through when his back snapped?

Mr. Ruffalo: Yes, as he was shoving it through and because he had to be in a turn position as he was shoving it through, that's when he felt his back snap.

The Court: He didn't have to be in a turn position. He could face the small opening and push.

Mr. Ruffalo: Yes, Your Honor, but the situation was from his position on the truck he had to turn and put it in the opening because as he picks up the bags he steps forward.

The Court: It's beyond me. I don't see any negligence in this case.

Mr. Wright: I don't want to intrude in the argument, Your Honor, but I made a note when Mr. Moffatt was on the stand. Mr. Moffatt testified that ordinarily the door is open. The baggage man will throw the bags in sideways, but in this case, the car door, being partially closed, he was shoving them in the only way he could do it. The only reason I mention that I think it bears out Mr. Ruffalo's contention.

Mr. Mercer: Nothing other than what was normal practice.

[fol. 86] Mr. Wright: It isn't normal to have a door you can't open, Mr. Mercer. The railroad must assume that through this door this baggage has to be thrown and taken out.

The Court: I will go over my notes. Have you agreed?

Mr. Mercer: Nineteen years.

Mr. Ruffalo: Nineteen years.

The Court: All right, we will read that to the jury.

Don't you think you ought to take this case to the Court of Appeals so we know how to try it?

Mr. Ruffalo: I think, Your Honor, that we have the law that would support us on that, abundant law.

The Court: Do you have any case similar to this where there is a narrow door and somebody hurt his back while pushing something through the door and does some court call such a situation an unsafe place to work?

Mr. Ruffalo: The only case that I can cite among my notes here at this particular time is the one where they said the railroad's failure to make reasonably careful inspection before loading to determine whether a car could be unloaded without danger to employee constituted actionable negligence was a question of fact for the jury.

The Court: What case is that?

Mr. Ruffalo: 151 Atlantic 122.

[fol. 87] The Court: Atlantic. Don't you have a federal case on it?

Mr. Ruffalo: Chojinski vs. New York Central Railroad Company.

The Court: 151 Atlantic, not Atlantic Second.

Mr. Ruffalo: I think that is Atlantic.

The Court: An old case. I will look at it. I presume you have here your best.

(Recess taken.)

The Court: Are you prepared on your exhibit?

Mr. Ruffalo: I just want to stipulate, Your Honor, that it's been stipulated between the counsel for the plaintiff and the defendant that a man 53 years of age under the mortality tables of the Commissioners, 1941 standard ordinary mortality tables, would have a life expectancy of 19 years.

The Court: As I understand, you rest your case with the privilege of reading in some hospital records that are yet to come?

Mr. Ruffalo: That's right, Your Honor.

The Court: All right, plaintiff rests.

RULING ON MOTION FOR DIRECTED VERDICT, ETC.

The defendant P & L E Railroad's motion for a directed verdict on the grounds that there is no diversity of citizenship between the plaintiff and the P & L E Railroad is granted.

However, we will not rule on the motion for a directed verdict with respect to the dual employment angle until the end of the defendant's case at which time he will have [fol. 88] the right to renew the motion for a directed verdict. That is, the P & L E will have the right to renew its motion for a directed verdict, on the grounds that the plaintiff was not an employee of the P & L E Railroad. I think we better wait until we hear all the testimony before we rule on that.

Now, as indicated in chambers at ten o'clock this morning, counsel shall prepare a stipulation in accordance with the facts and submit it to me at about quarter of two. Is that agreed? So we will give you time to prepare that and we will rule on the other motions at two o'clock. You are recessed until two o'clock, ladies and gentlemen. Jury may retire.

(Jury retires.)

The Court: Mr. Ruffalo, that case at 151 Atlantic, 122, being the case of the Supreme Court of New Jersey, does not even mention an unsafe place to work and the facts are so obviously different from this case that I can't consider it any authority at all.

Mr. Ruffalo: There's been some difficulty in finding one exactly on point, Your Honor.

The Court: You never find one exactly on point, but that case is so far removed from this case that I am not even going to analyze it. I am surprised you'd even mention it to me. The opinion doesn't even mention an unsafe place to work, just pure negligence on the part of the railroad for having some stick in the bottom of the car covered by grain. That was just outright negligence. It didn't say anything about it being an unsafe place.

Mr. Ruffalo: I noted it under several cases I had noted here as being one in which as regards to loading purposes [fol. 89] and unloading as to the effect, failure to use reasonable care and inspection in regards to inspection and that was the purpose of noting it, that they have a duty, that the railroad has a duty to use reasonable care to make an inspection in regards to the conditions in cars.

The Court: That's right, if they fail to discover a defective condition. That's not in this case. The baggage man alleges, he said I have asked them a number of times to fix the door and they wouldn't fix it. So they were on notice to fix it. The defect in the door, if due to the negligence of the defendants is actionable, providing it caused the injury. Now, how in the world did that defective door cause the injury?

Mr. Ruffalo: I say it caused the injury in view of the fact that it wasn't open. You couldn't open it wide enough to permit, readily and accessibly, putting the baggage into the baggage car.

The Court: He put a number of bags in without any difficulty.

Mr. Ruffalo: The smaller ones, yes, but the larger ones would not go through because of the size and bulk of the particular large bags and he had to use force and an unusual amount of strength in order to push those through where he didn't have to do that in the other ones.

The Court: You say it was while he was pushing that he got this snap in the back?

Mr. Ruffalo: Well, he got the snap in the back. I mean, it's just the same thing as a man carrying a tie or a man [fol. 90] carrying a pipe, where one man, they don't give him sufficient help in order to carry a tie and he injures his back or one man lets go of it suddenly and drops it and an injury results in that manner or the weight shifts in his arms suddenly or something like that and he's caught with an unexpected amount of weight in his hands and it causes injury to him.

The Court: There wasn't anything sudden about this. He could see it. He saw it all during the performance of loading the smaller bags, as you say.

Mr. Ruffalo: Yes, but it was something he had to do and he had to do in a certain amount of time. He had to do it hurriedly and quickly and he was instructed to do it in order to do it by his superiors and he had no other choice but to do it that way. He had no one else there to help him. He couldn't call anybody, he couldn't ask anybody. He had to go ahead and do it the best possible way he could.

The Court: Suppose he had called somebody and someone else helped him push the bag through the door and he snapped his back. You say there could be no liability?

Mr. Ruffalo: No, I don't think so. He didn't have anybody to help him pick up the bags or to have anyone help him handle one end of these, in order to maybe lighten the load and maybe work the thing through the opening in such a manner that he could have gotten it in there without having to use the amount of force he had to use. I mean, in the light as I have cited before, in the light of the Rogers [fol. 91] vs. Missouri case, which the Supreme Court has said that we do not follow the common law principles of negligence, we apply the negligence as we see it here and that in view of the fact that there is no federal workmen's compensation act, that we are permitting these things to go to the jury for a question of fact for the jury to decide. The Supreme Court has handed down the Tiller case, the Lilly case, the Blair case, the Baily and numerous others, that if there is the slightest doubt in the mind that the

case should go to the jury. If it's just even the slightest amount of doubt, that the case should go to the jury.

The Court: Suppose I don't have any doubt?

Mr. Ruffalo: Well, I don't know. I think you do, Your Honor, in view of the fact you say if the door is defective, then that's a different thing, that the door wouldn't open because it's defective. I think that shows that there is some doubt in your mind as to just exactly what did take place and where the negligence lies and what the situation was there at that time.

The Court: But how can the jury with reason find that that defective door caused him to hurt his back?

Mr. Ruffalo: I think they can with reason, such as they could find in many of those other cases that the courts have held that man was hurt in similar type of cases where there was too much—where the man lifted a tie that was too heavy for him or where a man was told to carry a pipe and he hurt himself.

[fol. 92] The Court: It's very easy to see how lifting a heavy tie hurt him. Very easy to see that. But the door, he never touched the door.

Mr. Ruffalo: Well he himself, no, but the baggage would itself, I mean touch the door and come in contact with the sides of the door and the sides of the car, so that you would be trying to push an object through a space that was too small for it to go through and in order to do the job and get it on there, he used the force to shove it in, brute force to go in there and in that manner he got hurt. I think it's very reasonable and it's very plausible that such a thing can happen. I think a jury can very reasonably see it.

The Court: As you now state it, it's all right. It certainly was confusing where it was an unsafe place to work. I can't see anything unsafe about it. It was just a plain defective door that caused him, that played some part in causing the injury. I can see that. When you put it on an unsafe place to work, you get me clear out into left field.

Mr. Ruffalo: It may be my fault in misleading Your Honor. That's how I interpreted it. I may have interpreted it in the wrong light.

The Court: Maybe you're right, but I just can't see that. Maybe you are right.

Mr. Mercer: Even the Rogers case demands some negligence. I don't think there is in evidence in this case at all which even points by a scintilla that the door had the slightest thing to do with any injury here. The plaintiff, Michael Shenker, testified he picked these bags up and put [fol. 93] them through the opening. The bigger ones he just pushed over. There is no testimony that there was any contact of a bag with the side of the door, the side of the train. There is no testimony that any bag caught in the door. There's no testimony that this door had anything to do with any alleged injury. I fail to see even a scintilla of anything here.

The Court: We will see if the jury can see it.

The B & O Railroad can't delegate its duty to provide cars without defective doors to the P & L E and if it was a defective door and the jury so finds, and they find it was due to the negligence of the P & L E, the B & O Railroad is liable. Can't delegate its duty to its employees on some other railroad which they are required to service.

Mr. Mercer: What duty did we violate?

The Court: Failure to have a door that would open.

Mr. Mercer: What did that have to do with the accident? Shenker hasn't said it.

The Court: It's hard for me to see. Maybe the jury can see it.

Mr. Mercer: Shenker certainly hasn't said anything like that. This is purely in the realm of speculation. If ever a defendant or defendants should walk out of a courtroom free, this is one.

Mr. Wright: Doesn't the act say that the action or non-action of the defendant is causing in whole or in part the accident?

[fol. 94] Mr. Mercer: Yes, but you have to prove something about it.

Mr. Wright: All right, the normal loading, you stand. I have thrown these mail sacks around myself. I used to have a job like that. You bend down, you throw them in the car. You have plenty of room to throw them. Here you have a narrow restricted place. He goes through tortuous motion. He goes over to the door, shoves them through, gets out of the way of the door, so he can shove

another one in. The twisting and shoving is an unnatural motion for the job and he experienced a bad back. He may have been able to do it for two weeks and not have kinked his back in exactly the same way as to cause him to get a ruptured disc. He did get hurt, Your Honor.

The Court: Your own doctor proved you can get that by sneezing or coughing. Surely you are not going to make the railroad pay for that.

Mr. Wright: No, I wouldn't say that. One of the elements it certainly can't be charged by defendant that this man is faking an accident when their own doctor removed a disc.

The Court: Oh no, he's hurt.

Mr. Wright: I admit we have to go further than that. We have to show some causal connection. But we only have to show it in whole or in part. If that narrow constricted doorway contributed in part to the accident, I think under all the cases, I have seen a lot weaker cases than this go to the jury. The tendency is to allow the slightest evidence of negligence go to the jury, as Mr. Ruffalo said.

[fol. 95] The Court: I agree with it, even when I can't see it. I can see the defective door if the evidence as counsel for plaintiff mentioned is in the case, that that might be found with reason to have played some part, some slight part in causing this back, if the jury wants to believe it.

Mr. Wright: You know, I am like Your Honor. I have been trained in the common law. When I first came down here several years ago on these F.E.L.A. cases, they astounded me. When I read the decisions, I am gradually adjusting my ideas to a different logic in the application of the rule of negligence in the Federal Courts and even the state courts in F.E.L.A., in Jones Act cases than I had been taught to follow all my life. The adjustment is rather difficult. If the adjustment has been made by the courts, we are entitled to it, the same as other plaintiffs.

The Court: Well, too often I see a railroad worker getting hurt where the railroad is not negligent in the slightest degree and he searches around for something on which he can tag it with negligence and I just had one last week where the jury just wouldn't agree on it. It was so obvious

he was hurt on the railroad performing some duty that wasn't negligence on the part of the railroad at all, and they won't agree on that.

Everybody knows that swinging mail into a baggage car can hurt a lot of people's backs. If that's what happened, there wouldn't be any liability on the railroad. I think there ought to be but there isn't under the law. It's not a compensation act.

[fol. 96] Mr. Wright: Sort of halfway between, according to the courts. It seems to be sort of halfway between the common law liability and a non-faulty liability. I find it pretty hard to get the line of demarcation.

The Court: There must be negligence. There must be some evidence of negligence, but it doesn't have to be very much.

Mr. Mercer: I hope you will rule with me, but still I would like maybe a little extra time at noon because I have Dr. Thurston Adams in town from Baltimore, at which time in accordance with our agreement with plaintiff's counsel, we'd like him to examine the plaintiff.

Afternoon Session, 2:00 p.m.

READING OF STIPULATION TO BE SUBSTITUTED FOR A PREVIOUS ONE

The Court: Ladies and gentlemen, when the trial opened, as you recall, Mr. Ruffalo for the plaintiff read you a stipulation. The stipulation I thought was inconsistent with the testimony so I requested counsel to agree on another stipulation to be substituted for the fourth stipulation.

4. It is hereby stipulated that the Pittsburgh & Lake Erie Railroad Company had one westbound track and one eastbound track with a platform and waiting room at Mahoningtown, New Castle, Pa. B & O Railroad had one westbound track and one eastbound track with a platform and passenger station which station was north of the B & O tracks. No P & L E trains came over the B & O tracks. However, B & O employees would service P & L E trains [fol. 97] stopping at Mahoningtown, New Castle, Pa., and

running on P & L E tracks. The baggage carts or trucks were owned by the B & O Railroad and the employees operating the baggage cart or trucks were paid by the B & O Railroad. The ticket agent at the B & O station was paid by the B & O Railroad. However, he would sell some P & L E and B & O tickets.

Now, the only thing that's confusing to me, gentlemen, is Mahoningtown, New Castle. I thought New Castle was a city.

Mr. Ruffalo: That is, Your Honor. Mahoningtown is just a section of it, like you might have the Squirrel Hill section of Pittsburgh.

The Court: When you speak of Mahoningtown, New Castle, that's a station in New Castle at a place called Mahoningtown, is that correct?

Mr. Ruffalo: Yes.

RULING ON MOTION FOR DIRECTED VERDICT, ETC.

The Court: All right, it's clearer now than it was.

The defendant's motion on behalf of the B & O Railroad for a directed verdict is denied. Defendant's motion in behalf of the P & L E for a directed verdict is denied, except as heretofore granted with respect to the common law action based on diversity of citizenship which was granted. All right, proceed with the defendant's opening address.

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[fol. 98] Defendant's Case

EDWARD WILLIAM BECK, a witness in behalf of the defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Mercer:

Q. What is your full name?
A. Edward William Beck.
Q. Where do you live?
A. 948 Cadwell Avenue, Elmhurst, Illinois.
Q. Elmhurst, Illinois?

A. That's right.
Q. How long have you been living there?
A. Oh, about five months.
Q. Are you married?
A. Yes, I am.
Q. Any children?
A. Two.
Q. Are you employed today?
A. Yes, I am.
[fol. 99] Q. For whom do you work?
A. I work for Standard Oil Company of Indiana.
Q. How long have you worked for the Standard Oil Company of Indiana.
A. About three months.
Q. Back in October of 1956, by whom were you employed?
A. Pittsburgh & Lake Erie Railroad Company.
Q. In what capacity?
A. Well, I was in passenger service as a baggage man, a flag man and a brakeman.
Q. On the night of October 14th, were you working?
A. Yes, I was.
Q. Where?
A. Train 79 as a baggage man.
Q. Train 79?
A. Yes, sir.
Q. What time did that train—where did it originate?
A. It originated in Pittsburgh.
Q. What was its destination?
A. Youngstown, Ohio.
Q. What time did it leave Pittsburgh?
A. That I couldn't say right offhand.
Q. What time was it supposed to hit New Castle?
A. Well, around 12:30 in the morning.
Q. Were you working in the baggage car that night?
A. Yes, I was.
Q. Had you worked that shift or that run prior?
A. Yes, I did.
Q. How long prior?
A. Oh about a year or so.
Q. Were you working that same truck?

A. No, I was working off the extra board.

[fol. 100] Q. Had you been working Train 79 before?

A. Yes, sir.

Q. And did you work Train 79 after October 15, 1956?

A. Yes, I did.

Q. How many doors does a baggage car have?

A. It's got four doors.

Q. Tell us what they are.

A. Well, there's two doors on each side of the car.

Q. On each side of the car?

A. Yes, there is.

Q. How many doors did the baggage car on Train 79, October 15, 1956, have?

A. It had the same amount, four door.

Q. Was this a regular baggage car?

A. It was a regular baggage car, assigned to that regular run.

Q. When you came into New Castle station or Mahoningtown station, as we have been calling it, do you recall whether there was anything the matter with a door?

A. No, I don't.

Q. Do you recall having talked to Michael Shenker that this door was defective?

A. No, I don't recall whether I said anything about the door.

Q. Do you recall having told him that this had been reported?

A. No.

Q. Did the door work all right, to your knowledge?

A. It did.

Q. Cross-examine.

[fol. 101] Cross examination.

By Mr. Ruffalo:

Q. On this evening when you stopped at New Castle in order to load the baggage onto the baggage car, did you have the door fully open?

A. To my knowledge, I had it fully open.

Q. Well, do you know or don't you know whether or not it was fully open?

A. Well, that's a pretty long time ago. You are going back five years now.

Q. That was about five years ago?

A. It was pretty close to it.

Q. When did you first learn that this thing was coming up, this case was coming up?

A. This case, oh, let's see. I was contacted sometime last year that the two railroads were being sued. Now the first time.

Q. That was the first time?

A. That's the first time.

Q. And a period of about three years had gone by then?

A. Pretty close to that, yes.

Q. You had no particular reason to remember the date of October 15th, 1956?

A. Well, actually, no.

Q. So you wouldn't be able to say definitely whether the door was fully open on October 15, 1956 or not, would you?

A. No, I couldn't.

Q. That's all.

[fol. 102] Redirect examination.

By Mr. Mercer:

Q. During your entire run, as many runs as you made on 79, did you ever have a bad door?

A. No.

Q. That's all.

Mr. Mercer: Mr. Moffatt, could I recall you, please?

Richard H. Moffatt, a witness in behalf of the defendant, having been previously sworn, testified as follows:

Direct examination.

By Mr. Mercer:

Q. You have been up there once, so you don't have to be sworn.

The Court: You are still under oath, Mr. Moffatt.

Q. I wanted to ask you where you were standing on the platform of New Castle station while Mr. Shenker was loading?

A. Right alongside of the truck where they was loading the mail.

Q. If we take, for example, this table here, as the baggage cart or baggage truck and that the jury box is the baggage car, is that correct?

A. That's right.

Q. Where were you standing?

A. I was standing right about where you would be.

[fol. 103] Q. Right here?

A. Alongside the cart.

Q. You told me this morning that this baggage cart had about one-third of it with sacks of mail?

A. That's right.

Q. And the door was open, I believe you stated, 20 to 24 inches?

A. That's right.

Q. And where would that be?

A. That would be on the lower end of the cart.

Q. Down here?

A. In what we call the back of the truck.

Q. Back of it?

A. Yes, sir.

Q. Where was the mail?

A. Mail would be on the front end.

Q. On the front end?

A. Yes, sir.

Q. So Mr. Shenker would be standing in here?

A. That's right.

Q. The mail would be up here?

A. That's right.

Q. And the door opening would be back where he was standing?

A. Right in front of him, yes.

Q. Is that correct?

A. Yes, sir.

Q. Could you describe for me, first let me ask you, you watched him put this mail or these sacks on the train, did you not?

A. Yes, sir.

Q. Did you ever see anything blocking the doorway of that train?

[fol. 104] A. No, sir.

Q. Could you describe for this jury what you saw Shenker do while he was on this baggage cart? Do you want to come down here?

A. (Witness leaves stand.) Standing here I'd be standing up close to the cart. The mail would be up here. The door would be up in here. He would be going like this (indicating). On smaller pieces he'd toss them in like that. On large pieces, he would pick them up, stand them up and hold them over. As soon as one would be throwed in there, the baggage man would pull them away so there wouldn't be nothing to obstruct the next one from being pushed in.

Q. That's what you saw him do, the whole thing?

A. Yes, sir.

Q. Is that normal procedure?

A. Yes, sir. (Witness resumed stand.)

Q. I have no other questions.

Cross examination.

By Mr. Ruffalo:

Q. Mr. Moffatt, do you recall signing a statement for me the other day in which you said in this statement that the door was open about 20 inches?

A. Yes, sir.

Q. Would you say it was normal to only have the door of the baggage car open 20 inches?

A. I wouldn't say that it was normal. I'd say it was normal to throw the baggage in the way he was throwing it in.

Q. But it wasn't normal to have the door just open 20 inches?

A. That's right.

[fol. 105] Q. How long was this baggage car, do you have any idea?

A. Oh, I'd say ten feet.

Q. About ten feet?

A. That's right.

Q. So the door was open here about 20 inches?

A. That's right.

Q. The rear end of the baggage truck?

A. That's right.

Q. And I believe you testified that the baggage was piled in the front of the baggage truck, is that right?

A. That's right.

Q. About one-third of the distance?

A. Yes, sir.

Q. So that we'd have the front of the baggage truck would be about here and you'd have about three feet of that where there would be, the baggage piled up front, is that right?

A. Yes, sir, that's right.

Q. And you say that Mr. Shenker stood back here and went like this (indicating) and then put the baggage in?

A. You are making a pretty big long truck.

Q. What?

A. You are making a pretty big long truck there. It isn't quite as long as you—

Q. It's about three feet here.

A. It isn't so long as that desk there.

Q. I think the evidence is here from the interrogatories that it's 119 inches. Ten feet would be 120 inches, isn't that right?

A. That's right.

[fol. 106] Q. So there's about three of my steps, and one of my shoes. My foot is about a foot long?

A. That's right.

Q. Another foot would bring it down here. This would be the front of the truck?

A. But you don't stand clear back, as far as you possibly can stand when you're throwing in. You stand the best place you can get, and handle the mail wherever he's loading.

Q. You stand here some place in the middle of it then and push it through the 20 inch opening from here?

A. Any place at all that you need. Your truck is supposed to be spotted where the truck is being loaded.

Q. What?

A. Your truck is supposed to be spotted where you are going to load. If you need it up or down or anything like that.

Q. You said it was spotted so that the rear of the truck was opposite the door, the 20 inches?

A. No, I said where he was standing was opposite the door.

Q. I believe you just testified for Mr. Mercer here, that the rear, he was standing at the rear of the truck and the rear of the truck was opposite the opening of the door?

A. Not the rear of the truck. Where he was standing would be opposite where the door was. The rear of the truck would be back even with the—

Q. The rear of the truck was now back even?

A. With the door, that's right.

Q. With the door?

A. Now, don't forget. What are you talking about, the baggage door or the door opening? There's an outline that [fol. 107] I call the door. There's a door here that's opening. The outline here is where the baggage truck is back here. There's another baggage door in here. He's standing in between here.

Q. He's standing in between there?

A. That's right.

Q. Whereabouts is he standing? Is he standing in the center here of the baggage truck now?

A. Standing not in the center of the baggage truck. He's standing back on the lower end of the baggage truck immediately in front of where the door was open.

Q. He's standing back at the lower end of the baggage truck, immediately in front of the door opening? Is that right?

A. All right.

Q. So isn't that substantially what we are talking about?

A. That's all right.

Q. Then the front of the baggage truck is up here?

A. All right. Three foot of mail on it.

Q. With three foot of mail on it? So we step up about three feet. We've got the mail piled up in here. He's standing back here, is that right?

A. That's right.

Q. I believe you said you saw nothing blocking the doorway of the train?

A. That's right.

Q. You mean the 20 inch opening, you saw nothing in the 20 inch opening?

A. That's right.

Q. But you don't know whether the baggage was piled up against the door of the baggage car on the inside?

A. It could have been.

[fol. 108] Q. It could have been?

A. That's right.

Q. That's all.

Redirect examination.

By Mr. Mercer:

Q. That would be beyond the opening, wouldn't it?

A. That's right, where I couldn't see.

Q. That's all.

By the Court:

Q. Mr. Moffatt, while you were standing there alongside the cart watching this operation, did you see Mr. Shenker, the plaintiff, push the door?

A. No.

Q. Open it further?

A. When I come in off the train, again I got up to where the baggage truck was, the door was already open. Whatever they done to it, I don't know anything about it.

Q. When you were there, did you see the plaintiff Shenker push the door open further?

A. No, sir.

Q. Did you see the baggage man push the door open further?

A. No, sir.

Q. Did you overhear a conversation between them, between Shenker and the baggage man?

A. No, sir.

Q. Do you recall of them talking together while you were there?

A. No, I don't, unless the ordinary chit-chat or something like that.

[fol. 109] HARRY LEWIS BANKS, a witness in behalf of the defendant, having been previously sworn, testified as follows:

The Court: Mr. Banks recalled by the defendant. You are still under oath.

A. Yes, sir.

Direct examination.

By Mr. Mercer:

Q. Mr. Banks, I believe you stated that you were in charge of this station?

A. I did.

Q. On this particular trick?

A. That's right.

Q. And that Shenker would be underneath you.

A. That would be true.

Q. He'd be responsible to you?

A. Right.

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[fol. 112]

LING ON MOTION FOR DIRECTED VERDICT, ETC.

Court: Now, I have a motion by the Pittsburgh & Lake Erie Railroad Company, defendant, for a directed verdict, for the reason set forth that the plaintiff failed to prove negligence. Although it was doubtful in my mind, I think I will adhere to my former ruling and refuse the motion on that ground.

Plaintiff is guilty of contributory negligence. What evidence do you have that the plaintiff—

Mr. Mercer: That, of course, Your Honor, would be excluded since there's no diversity of citizenship here. I believe that common law action went out anyhow, did it not?

The Court: Yes, the common law action went out but the allegation that the contention that this plaintiff was employed by the P & L E is still in. If he's an employee of the P & L E he can recover a verdict against them. The question is, is he an employee and you haven't mentioned [fol. 113] that in your directed verdict. I don't know whether there's any proof that he is an employee or not.

Motion by the B & O Railroad for a directed verdict, failure to prove negligence. You mentioned contributory negligence. Motion of the B & O Railroad for a directed verdict is refused. What evidence do you have of contributory negligence?

Mr. Mercer: I don't even think there's any evidence of negligence here.

The Court: I know, but how about contributory negligence? Assume there is enough evidence of negligence. What proof is there of contributory negligence?

Mr. Mercer: About the only proof would be here, Your Honor, his statement as to how he picked these things up and that would be a question for the jury, whether or not it was negligent on his part to put the bags like there were on this cart into that kind of a narrow opening.

The Court: All right. Maybe it's in.

Mr. Mercer: That would be the question of fact for the jury.

The Court: Well, I don't know what to do here. You haven't raised the vital question in the case here, if the P & L E is in the case, that this plaintiff is an employee of the P & L E, as well as an employee of the B & O Railroad. Now, I don't know where we are on that. You haven't mentioned that as a ground for a motion.

[fol. 114] Mr. Mercer: I will have a supplemental motion. I didn't know we were going to finish so fast this afternoon.

The Court: What proof is there?

Mr. Mercer: There isn't any.

The Court: What proof do you have that this plaintiff is an employee of the P & L E Railroad, and therefore is

entitled to recover from that railroad under the Federal Employer's Liability Act?

Mr. Ruffalo: In view of the fact he did the janitorial work in the P & L E station and that he serviced these various trains with baggage and with mail.

The Court: Do you think that's enough?

Mr. Ruffalo: I would think that would put him under their employment.

The Court: Suppose I hired you to clean out my cellar which very badly needs it and you hired Mr. Wright to do the work. Wright comes and cleans out my cellar. Is he my employee? He is working on my house.

Mr. Ruffalo: I would be an independent contractor. If I hired Mr. Wright, of course he would be my employee. But this is a situation where you have a servant, it's almost like in these longer—

The Court: Who hired him?

Mr. Ruffalo: The B & O hired him.

The Court: I think you have to hire a servant, have proof that he was loaned to you. Somebody loans me a [fol. 115] servant, I pay that servant, don't I? There's no proof here that he was loaned to anyone. He just worked over there at the direction of the B & O bosses.

Mr. Ruffalo: It's admitted in the evidence that there was a contract existing between the P & L E and the B & O Railroad that they should be able to use their facilities and their employees.

The Court: It says nothing about loaning servant or employees.

Mr. Ruffalo: No, but there is compensation for the use of it.

The Court: We don't know that. The contract—

Mr. Ruffalo: I think the contract would imply the fact that they didn't get it for nothing.

The Court: Oh no, the contract isn't in evidence. Maybe it's purely a gratuitous agreement. What evidence is there that there was a contract anyway?

Mr. Ruffalo: They said there was a contract existing between the B & O and the P & L E Railroad.

The Court: Where is that?

Mr. Ruffalo: That was in the first stipulation, and it also appears in the answer of—

The Court: Let me see.

Mr. Ruffalo: Of the Baltimore & Ohio and the answer of the P & L E. I am quite certain.

[fol. 116] The Court: That hasn't been admitted in evidence.

Mr. Mercer: None of that. P & L E did not have the right to hire and fire and did not have control over Michael Shenker.

The Court: I am asking where he had evidence where Shenker was loaned to the P & L E Railroad.

Mr. Ruffalo: I don't have evidence that he was loaned. There is evidence there was a contract between the B & O and the P & L E.

The Court: Let me hear that. Refer me to that.

Mr. Ruffalo: That was in Stipulation 4, which was read.

Mr. Mercer: Oh no.

The Court: Stipulation 4 says nothing about it. Here it is, the one you prepared at noon today.

Mr. Ruffalo: I mean the original stipulation.

The Court: That is out of the case. This was substituted for it, because that was so inconsistent with the testimony that it is stricken out. I asked you today to substitute one according to the facts. This is what I got. I told the jury that the one that you read at the beginning of the case was inconsistent and I asked you to prepare a new one in accordance with the facts and this is the one I got. The original one is out of the case.

[fol. 117] Mr. Ruffalo: Well, I understand. I thought that the original idea is that the contract was still in the case.

The Court: The fourth stipulation is out of the case and this is what came up as your substitute. I asked you to put down exactly—

Mr. Ruffalo: Only to explain the situation that existed there at the station, but it didn't change the terms of the contract or the contract relation of the parties.

The Court: We have no contract in evidence. All we know is that the B & O Railroad was servicing the P & L E trains by their baggage man.

Mr. Ruffalo: I would like to further amend that No. 4 and include the contract stipulation in it that was in No. 4 originally, Your Honor.

The Court: Well, it read Pittsburgh & Lake Erie Railroad Company, the other defendant, was authorized by contract with the Baltimore & Ohio Railroad to use the facilities at the station at New Castle, Pa., for the taking on and discharging of passengers and the loading and unloading of baggage and mail. That stipulation was entirely incomprehensible to me under the facts as testified by your witnesses and that's why I asked you to revise it.

The Pittsburgh & Lake Erie Railroad Company was authorized by contract with the Baltimore & Ohio Railroad to use the facilities of the station. What station?

[fol. 118] Mr. Ruffalo: The B & O station.

The Court: They didn't use it at all under the facts of this case. They were using their own station. They did sell their tickets over there, if that's what you meant and that's still in the case. That's what you meant by authorized by contract. It's still in the case.

You have agreed in your substituted 4 that the ticket agent of the B & O station was paid by the B & O Railroad. However, he would sell some P & L E and B & O tickets.

Mr. Ruffalo: But there's no express stipulation in there that there was a contract arrangement for use of these facilities.

The Court: Facilities where?

Mr. Ruffalo: At the B & O Station.

The Court: There's no evidence in this case that the P & L E used any facilities of the B & O station except that the ticket agent sold some tickets.

Mr. Ruffalo: The ticket agent can use—

The Court: It has no bearing on this case.

Mr. Ruffalo: They used their employees and the baggage truck also.

The Court: You mean to say that the P & L E was authorized by contract with the Baltimore & Ohio Railroad to use the facilities at the station at New Castle of taking on and discharging passengers and loading and unloading [fol. 119] of baggage and mail? I asked you once at what station, you said the B & O Station. There's no such proof in this case. The P & L E didn't use the facilities of the B & O station at New Castle under a contract for the taking on and discharging of passengers and loading and unload-

ing baggage and mail. They used their own station. That's what I have been complaining about ever since the case started.

Mr. Ruffalo: They used the baggage—

The Court: The stipulation just doesn't prove it.

Mr. Ruffalo: They used the baggage trucks of the B & O, and they used their employees and they used the shed over there of the B & O station in which they would house these trucks and bring the mail into there and where the mail truck would back up to that particular shed there and door, and they would load the mail on to the mail truck when it came there. That was the only way they have of getting the mail, the Pittsburgh & Lake Erie on to the mail truck.

The Court: Motion of the Pittsburgh & Lake Erie Railroad for a directed verdict is granted, there being no proof in this case that I can see that a jury could possibly find that the P & L E employed the plaintiff as an employee. Therefore, we will go to the jury on the case of Michael Shenker against the Baltimore & Ohio Railroad alone.

(Adjournment taken until Wednesday morning, April 19, 1961.)

[fol. 120] Morning Session

Wednesday, April 19, 1961

The Court: Let the record show that the defendant Pittsburgh & Lake Erie Railroad Company, defendant, has filed another motion for a directed verdict, setting forth an additional ground. The motion is granted as it was yesterday.

Are you ready to go to the jury?

Mr. Mercer: Yes, Your Honor.

(Mr. Mercer closed to the jury.)

(Mr. Ruffalo closed to the jury.)

IN UNITED STATES DISTRICT COURT

MOTION BY THE BALTIMORE AND OHIO RAILROAD COMPANY, DEFENDANT, FOR DIRECTED VERDICT—April 18, 1961

And Now, April 18, 1961, defendant, The Baltimore and Ohio Railroad Company, by its attorneys, H. Fred Mercer, and Mercer & Buckley, respectfully moves the Court to direct a verdict in its favor for the reason that the plaintiff has failed to prove any negligence on its part or on the part of its servants, agents or employees, which was the proximate cause in whole or in part of his alleged injury.

Mercer & Buckley, H. Fred Mercer, Attorneys for Defendant, The Baltimore and Ohio Railroad Company.

[fol. 121]

IN UNITED STATES DISTRICT COURT

MOTION BY THE BALTIMORE AND OHIO RAILROAD COMPANY, DEFENDANT, FOR JUDGMENT N.O.V.—April 20, 1961

And Now, April 20, 1961, defendant, The Baltimore and Ohio Railroad Company, having presented a motion for binding instructions in its favor, under Civil Procedure Rule No. 50, which was not granted, now moves the Court to set aside the verdict and judgment against it, and grant a judgment in its favor in accordance with its Motion for Directed Verdict.

Mercer & Buckley, H. Fred Mercer, Attorneys for Defendant, The Baltimore and Ohio Railroad Company.

[fol. 122]

IN UNITED STATES DISTRICT COURT

VII.

OPINION AND ORDER—August 8, 1961

Marsh, District Judge.

In this F.E.L.A. case, there was evidence from which the jury could have found the following facts: On October 15, 1956, the 49-year-old plaintiff was employed by the defendant, Baltimore and Ohio Railroad Company (B. & O.) as a baggageman, his duties, inter alia, being to assist in loading and unloading mail cars at the passenger stations of defendants, B. & O. and The Pittsburgh & Lake Erie Railroad Company (P. & L. E.), at their Mahoningtown, New Castle stations. Tracks of the P. & L. E. and tracks of the B. & O. were located between the two stations. In order to service P. & L. E. mail cars, plaintiff had to leave the B. & O. station, cross the B. & O. and P. & L. E. tracks, and go upon the platform of the P. & L. E. station. The P. & L. E. station was unmanned. The B. & O. ticket agent sold tickets to P. & L. E. passengers; plaintiff was paid by B. & O. and was subject exclusively to that company's orders and directions.[1]

Early in the morning, plaintiff pulled his wagon or cart onto the P. & L. E. platform, stopped it in front of the doorway of the mail car on a P. & L. E. train, and pro-
[fol. 123] ceeded to pick up the mail bags on his wagon and swing some of them through the opening of the mail car door where the P. & L. E. baggageman, Beck, received them.

On this occasion the sliding door on the P. & L. E. car would not open its full width but would open only 18 to 20

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[1] The defendant P. & L. E. was granted a directed verdict because the plaintiff did not allege or prove that he was an employee of the P. & L. E., cf. Hull v. Phila. & Reading Ry. Co., 252 U.S. 475, and because they were both citizens of Pennsylvania. Jacobson v. N. Y., N. H. & H. R. Co., 347 U.S. 909 (1954), affg. 206 F. 2d 153; DiFrischia v. New York Central R. Co., 279 F. 2d 141, 143 (3d Cir. 1960).

inches. When plaintiff swung a mail sack weighing 80 to 100 pounds into the narrow opening, the width of this sack prevented it from going through the opening, and he had to exert considerable extra force to push it through the narrow opening into the car. In so doing, he twisted his body and felt a snap in his back. He reported the injury promptly to the B. & O. On subsequent examination, he was found to have sustained a ruptured intervertebral disc, which eventually required a laminectomy. This injury resulted in a permanent disability.

The defendant, B. & O., moved for a directed verdict which was denied. The jury found a verdict in favor of plaintiff in the sum of $40,000. Defendant now moves for judgment notwithstanding the verdict.

It was the duty of defendant employer to use reasonable and ordinary care to provide plaintiff, its employee, with reasonably safe cars, appliances, and equipment in connection with his work. A failure to do so is negligence. This duty is a continuing and nondelegable one. The fact that the car was owned by and located on the tracks of another railroad does not absolve the defendant employer from liability for the injuries its employee may sustain by reason of its failure to provide him with reasonably safe cars, appliances or equipment. Cf. Kooker v. P. & L. E. R.R. Co., 258 F. 2d 876 (6th Cir. 1958); Chicago Great Western Ry. Co. vs. Casura, 234 F. 2d 441 (8th Cir. 1956); Beattie v. Elgin J. and E. Ry. Co., 217 F. 2d 863 (7th Cir. 1954).

[fol. 124] The evidence, we think, was sufficient for the jury to find with reason that the defective door created an unreasonably unsafe condition for an employee whose duty was to swing heavy mail sacks from a cart into a mail car; that it was foreseeable that this condition might cause an injury to him; and that it was negligence to fail to eliminate the unsafe condition after notice thereof prior to the accident.

In addition, there was sufficient evidence from which the jury could find with reason that this unsafe condition contributed in whole or in part to the plaintiff's injury.

Furthermore, there was evidence from which the jury could find that the unsafe condition existed for a period

sufficiently long that defendant, B. & O., had constructive notice thereof. Plaintiff testified that, immediately prior to the accident and while he and Beck were trying unsuccessfully to open the door wider, he told Beck, the P. & L. E. Baggageman, that he ought to get the door fixed, and Beck replied that he had reported it for repair, but that the door had not been fixed. T., pp. 27, 28, 53.

"Inasmuch as plaintiff at the time of the accident was in a place where his assigned duties required him to be, defendant on the issue of negligence was charged with knowledge" of the condition created by the defective door "which in the exercise of reasonable care it could have ascertained." Notice of a condition rendered unsafe by a defective appliance will be imputed to the employer where it could have been discovered by reasonable inspection and by the exercise of reasonable care. Beattie v. Elgin, J. and E. Ry. Co., supra, at p. 866;[2] see also, citations, supra. [fol. 125] The employer's duty to inspect and to repair a defective appliance creating an unreasonably unsafe condition cannot be delegated. In the case at bar, it was for the P. & L. E. to discharge that duty, and its negligence in failing to do so was the negligence of the plaintiff's employer, B. & O., as a matter of law.

We agree with the defendant that it is difficult to understand how the jury could find that the narrow opening caused by the defective door created an unreasonable risk of harm on which to predicate liability, and if it could, how the jury could find that an injury could reasonably be foreseen; however, those issues, as well as the other issues mentioned, were for the jury. Lavender v. Kurn, 327 U.S. 645; Rogers v. Missouri Pacific R. Co., 352 U.S. 500; Sano v. Pennsylvania R. Co., 282 F. 2d 936 (3d Cir. 1960); and cases cited supra.

An order will be entered denying the defendant's motion for judgment n.o.v.

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[2] This case distinguishes Kaminski v. Chicago River & Indiana R. Co., 200 F. 2d 1 (7th Cir.), and Wetherbee v. Elgin, J. and E. Ry. Co., 191 F. 2d 302 (7th Cir.), relied upon by defendant.

IN UNITED STATES DISTRICT COURT

ORDER OF COURT—August 8, 1961

And Now, to-wit, this 8th day of August, 1961, after argument and upon due consideration of the parties' briefs it is ordered, adjudged and decreed that The Baltimore and Ohio Railroad Company's "Motion for Judgment N.O.V." be and the same hereby is denied.

(signed) Rabe F. Marsh, United States District Judge.

[fol. 126]

IN UNITED STATES DISTRICT COURT

FINAL JUDGMENT

Pursuant to Verdict and Order, judgment is hereby entered in favor of Michael Shenker, plaintiff, and against The Baltimore and Ohio Railroad Company, defendant, in the sum of Forty Thousand and no/100 ($40,000.00) Dollars, together with costs.

James H. Wallace, Jr., Clerk.

[fol. 127]

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,755

MICHAEL SHENKER,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a corporation, and THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY, a corporation

THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellant.

Appeal from the United States District Court for the Western District of Pennsylvania.

Argued February 21, 1962

Before Goodrich, Kalodner and Ganey, Circuit Judges.

OPINION OF THE COURT—Filed April 11, 1962

By Goodrich, Circuit Judge.

The plaintiff recovered a judgment against the defendant, The Baltimore and Ohio Railroad (B&O), in a suit under the Federal Employers' Liability Act, 45 U.S.C.A. §§51-60. The incident which is the basis of the plaintiff's complaint took place in a railroad yard at New Castle, Pennsylvania, where the B&O and The Pittsburgh & Lake Erie Railroad Company (P&LE) have adjoining parallel tracks. Each railroad has its own waiting room in this railroad [fol. 128] yard, but only the B&O maintains a ticket office. Tickets for P&LE passengers are sold at the B&O ticket window in the B&O station on the B&O side of these tracks. The plaintiff was a B&O employee whose duties included wheeling a loaded mail truck across the B&O tracks to the

tracks of the P&LE, and loading the mail into a P&LE car. On the night in question plaintiff had brought his loaded truck to the door of the P&LE mail and baggage car. He claims that the door of this car stuck and that in endeavoring to force a large bag through the narrow opening of the car he wrenched his back and suffered the injuries complained of. Since the jury found in his favor his version of what happened must be taken to be accurate.

The court below was not completely happy with the verdict. See 196 F. Supp. 108 (W.D. Pa. 1961). He said that he agreed "with the defendant that it is difficult to understand how the jury could find that the narrow opening caused by the defective door created an unreasonable risk of harm on which to predicate liability . . . . " Nevertheless, being familiar with the decisions in this field, he did not interfere with the jury's verdict.

Our difficulty comes from one point which the court passed over rather lightly. He said:

> "The employer's duty to inspect and to repair a defective appliance creating an unreasonably unsafe condition cannot be delegated. In the case at bar, it was for the P. & L.E. to discharge that duty, and its negligence in failing to do so was the negligence of the plaintiff's employer, B. & O., as a matter of law."

Our trouble comes in seeing how the negligence of the P&LE, if any, in having a defective door, became attributable to the B&O as a matter of law. As the judge himself pointed out in addressing counsel during the trial of the case: "We have no contract in evidence. All we know is that the B&O Railroad was serving the P&LE trains by their baggage man." The car alleged to be defective be- [fol. 129] longed to P&LE. Nothing appears to show us that the B&O had any control whatever over the car or any employees of the P&LE. We do not know that the B&O became the agent of the P&LE, nor, indeed, as the trial court pointed out, anything more than that a B&O employee hauled the truck over to the P&LE tracks and put the bags in the car.

If the P&LE was the employer of the B&O in this kind of a transaction we do not see any basis for attributing the negligence of the employer to the employee who had no notice of the defect and who had no control over what its "principal" did. As is stated in comment *b* to section 350 of the Second Restatement of Agency:

> "The knowledge of another agent or of the principal does not affect the liability of the agent. Thus, an agent who has no reason to know that the instrumentalities which he uses are not suitable for the work . . . is not liable for harm caused by reason of that fact."

The Supreme Court decision in *Sinkler* v. *Missouri Pac. R.R.*, 356 U.S. 326 (1958), is relied upon by the plaintiff. We think whatever impact that case has upon our situation tends to establish liability on the part of the P&LE and not the B&O.

The P&LE was initially joined in this suit. The judge dismissed the action against it on two grounds: (1) that no diversity of citizenship was shown; and (2) that there was no employee-employer relationship between the plaintiff, Shenker, and the P&LE.

To conclude: There was not the slightest evidence of any actual want of care to its employees on the part of the B&O; and, second, we see no basis whatever for attributing any negligence on the part of the P&LE to the plaintiff's employer.

The judgment of the district court will be reversed.

[fol. 130] KALODNER, Circuit Judge, dissenting

I would affirm the judgment of the District Court entered in favor of the plaintiff pursuant to the jury's verdict in his favor.

I agree with the District Court's holding, stated in its Opinion denying defendant's motion for judgment n.o.v., that "The evidence . . . was sufficient for the jury to find with reason that the defective door created an unreasonably unsafe condition for an employee whose duty was to swing heavy mail sacks from a cart into a mail car; that it was foreseeable that this condition might cause injury to him; and that it was negligence to fail to eliminate the

unsafe condition after notice thereof prior to the accident", and that "Furthermore, there was evidence from which the jury could find that the unsafe condition existed for a period sufficiently long that defendant, B. & O., had constructive notice thereof." 196 F. Supp. 108.

On this appeal defendant does not even contend that the trial judge in his charge to the jury failed to adequately instruct it with respect to the law relating to any of the aspects or elements of the negligence charged by plaintiff against defendant. The record discloses that not only did the defendant not except to the charge to the jury but that in response to the Court's question, addressed to trial counsel, "Gentlemen, have I misstated anything?" defendant's response was "No, Your Honor."

The majority premises its reversal of the District Court's denial of defendant's motion for judgment n.o.v. on its view that "There was not the slightest evidence of any actual want of care to its employees on the part of the B&O; and, second, we see no basis whatever for attributing any negligence on the part of the P&LE to the plaintiff's employer."

The sum of the majority's position is that the evidence failed to establish that defendant breached a duty to plaintiff. I disagree.

[fol. 131] The record discloses that the P&LE did not maintain any employees at its Newcastle station;[1] defendant's employees serviced P&LE trains operating on its tracks which stopped at its station;[2] and plaintiff was assigned by defendant to load and unload P&LE mail and baggage cars. It was during a mail loading operation that plaintiff was injured by reason of a defective door of a P&LE mail car. Evidence was adduced that P&LE had been earlier advised that the door was defective.

These principles are well settled: It is the duty of a railroad to use reasonable care to furnish its employees with a safe place to work;[3] " . . . the standard of care must

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[1] Plaintiff's Interrogatory No. 17 and defendant's Answer thereto.

[2] Paragraph 4, Stipulation at trial.

[3] Bailey v. Central Vermont Ry., 319 U.S. 350, 352 (1943); Sano v. Pennsylvania Railroad Company, 282 F.2d 936, 937 (3 Cir. 1960).

be commensurate to the dangers of the business";[4] the fact that a railroad does not own, maintain or control the premises on which its employee is injured in the course of his employment does not relieve it of its legal duty to provide its employees with a safe place to work, nor does it absolve it from liability for injuries sustained by its employees because of unsafe condition of the premises.[5]

These instances of application of the principles stated are relevant here:

A railroad switchman was injured when the engine on which he was riding passed over a faulty section of track which broke causing him to be thrown to the ground. The track in question was neither owned nor maintained by the raliroad which employed the switchman. The jury returned a verdict against the employing railroad. In affirming, the appellate court held that the absence of the elements of ownership or control of the premises on which the switchman was injured in the course of his employment did not [fol. 132] relieve the employing railroad of its legal duty to provide him with a safe place to work; that "the duty the law imposed upon the railroad to inspect the tracks over which it moves its trains imputes to it constructive knowledge of the unsafe condition." Denver and Rio Grande Western Railroad Company v. Conley, 293 F.2d 612, 613 (10 Cir. 1961):

A railroad switchman was injured in the course of performing his duties when struck by a defective gate on the property of a packing company which the railroad served. A jury verdict in favor of the injured employee against the employing railroad was affirmed even though it did not own or control the premises where the accident occurred. Chicago Great Western Railway Company v. Casura, 234 F.2d 441, 447 (8 Cir. 1956):

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[4] Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 67 (1943).

[5] Denver and Rio Grande Western Railroad Company v. Conley, 293 F.2d 612, 613 (10 Cir. 1961); Chicago Great Western Railway Company v. Casura, 234 F.2d 441, 447 (8 Cir. 1956); Beattie v. Elgin, Joliet & Eastern Railway Co., 217 F.2d 863, 865 (7 Cir. 1955).

A railroad switchman was injured when in the course of performing duties assigned to him by his railroad employer he slipped on oil or grease on the steel platform of a coal dumper owned and maintained by the United States Steel Corporation on its property. A jury verdict in favor of the injured switchman against the railroad was affirmed on the appellate court's holding that the railroad's "knowledge, actual or constructive, of the allegedly dangerous condition of the place where the accident occurred was a question for the jury." Beattie v. Elgin, Joliet and Eastern Railway Co., 217 F.2d 863, 867 (7 Cir. 1955).

In the instant case the majority directed its attention to the status—agency or otherwise—which obtained or didn't obtain between defendant and P&LE relating to the servicing by defendant of P&LE's facilities, i.e. mail car.

In my opinion the question of the status referred to is academic. Assuming arguendo that defendant acted as a volunteer Good Samaritan in giving neighborly aid to P&LE in servicing its mail cars and not as a result of some contractual arrangement, the duties imposed by law on defendant to provide plaintiff a safe place to work would not be affected, one way or the other.

[fol. 133] Principles of agency adverted to by the majority play no role nor do they have any impact in the situation here. Plaintiff's action against defendant is premised solely on an employer-employee relationship and a breach of the duty imposed by that relationship and not on any principal-agent status.

Assuming arguendo, as the majority did, that there existed a principal-agent relationship between P&LE and defendant, the impact of the agency principles pertaining to such relationship on plaintiff's case would be subject to the teaching of the Supreme Court that "Plainly an accommodating scope must be given to the word 'agents' to give vitality to the standard governing the liability of carriers to their workers injured on the job." Sinkler v. Missouri Pacific Railroad Co., 356 U.S. 326, 330 (1958). In *Sinkler* a railroad employee's injury was caused in whole or in part by the fault of an independent contractor performing operational activities of the carrier. It was never-

theless held that the independent contractor was an "agent" of the railroad within the meaning of the FELA. In *Sinkler* the Supreme Court further said (p. 329):

> "However, in interpreting the FELA, we need not depend upon common-law principles of liability. This statute, an avowed departure from the rules of the common law, cf. *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 507-509, was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54. The cost of human injury, an inescapable expense of railroading, must be borne by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier. *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 431, 438."

Finally, the majority's reversal of the District Court's denial of defendant's motion for judgment n.o.v. requires [fol. 134] reference to the holding in Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 506 (1957) that:

> "Under this statute [FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. . . . Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that the negligence of the employer played any part at all in the injury or death."*

For the reasons stated I would affirm.

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* Zegan v. Central Railroad of New Jersey, 266 F.2d 101, 102 (3 Cir. 1959).

[fol. 135] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13755

MICHAEL SHENKER,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a corporation, and THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, a corporation

THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: Goodrich, Kalodner and Ganey, Circuit Judges.

JUDGMENT—April 11, 1962

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs.

April 11, 1962.

[fol. 136] Petition for rehearing covering 7 pages filed May 3, 1962 omitted from this print. It was denied, and nothing more by order June 1, 1962.

[fol. 137] [File endorsement omitted]

[fol. 137]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,755

MICHAEL SHENKER,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a corporation, and THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY, a corporation

THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellant.

Present: Biggs, Chief Judge, and Goodrich, Kalodner, Staley, Ganey and Smith, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING—June 1, 1962

After due consideration the petition for rehearing in the above-entitled case is hereby denied. Biggs, Chief Judge, and Kalodner, Staley and Smith, Circuit Judges, dissenting.

By the Court,

Goodrich, Circuit Judge.

Dated: June 1, 1962

[fol. 138] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 139]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1962

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—September 1, 1962

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 14th, 1962.

Earl Warren, Chief Justice of the United States.

Dated this 1st day of September, 1962.

[fol. 140]

SUPREME COURT OF THE UNITED STATES

No. 414, October Term, 1962

MICHAEL SHENKER, Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

ORDER ALLOWING CERTIORARI—November 19, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 414

MICHAEL SHENKER, Petitioner,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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INDEX TO BRIEF

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement of Case	4
Reasons for Granting the Writ	6
Conclusion	12
Appendix—Opinions and Judgment Below	13-27

TABLE OF CITATIONS

CASES

Alltmont v. United States, 177 F. 2d 971 (3rd Cir. 1949)	7
Atlantic Coast Line R. Co. v. Robertson, 214 F. 2d 746 (4th Cir. 1954)	9
Beattie v. Elgin, J. & E. R. Co., 217 F. 2d 868 (7th Cir. 1954)	9
Butz v. Union Pacific R. Co., 120 Utah 185, 193, 233 P. 2d 332, 336 (1951)	11
Chesapeake & O. Ry. Co. v. Thomas, 198 F. 2d 783 (4th Cir. 1952)	9
Chicago G. W. Ry. Co. v. Casura, 234 F. 2d 441, 448 (8th Cir. 1956)	9
Denver & R. G. W. R. Co. v. Conley, 293 F. 2d 612 (10th Cir. 1961)	9
Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers, 294 F. 2d 399 (2d Cir. 1961) Affirmed, 370 P.S. .... (1962)	7
Ellis v. Union Pacific R. Co., 329 U.S. 649 (1947)	8
Harris v. Pennsylvania R. Co., 361 U.S. 15 (1959) reversing 168 Ohio St. 582, 156 N. E. 2d 822 (1959)	8

CASES	PAGE
Kooker v. Pittsburgh & L. E. R. Co., 258 F. 2d 876 (6th Cir. 1958)	9
Schlueter v. East St. Louis Connecting Ry. Co., 316 Mo. 1266, 1282, 296 S.W. 105, 112 (1927)	11
Sinkler v. Missouri Pacific R. Co., 356 U. S. 326 (1958)	11
Terminal R. Ass'n. of St. Louis v. Fitzjohn, 165 F. 2d 473 (8th Cir. 1948)	9
Textile Mills Securities Corp. v. Commissioner of Internal Revenue, 314 U. S. 326, 334 (1941)	6
United States v. American-Foreign S. S. Corp., 363 U. S. 685, 687 (1960)	6
Van Horn v. Southern Pacific Co., 141 Cal. App. 2d 528, 297 P. 2d 479 (1956)	9
Western Pacific R. Corp. v. Western Pacific R. Co., 343 U. S. 247, 261 (1953)	6

STATUTES

28 U. S. C. § 46(c)	2
28 U. S. C. § 1254(1)	2
45 U. S. C. § 51	3

MISCELLANEOUS

R. C., 51 Harv. L. Rev. 1287 (1931)	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. .....

MICHAEL SHENKER, Petitioner,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on June 1, 1962.

CITATIONS TO OPINIONS BELOW

The opinion of the trial judge, denying defendant's motion for judgment notwithstanding the verdict, is reported at 196 F.Supp. 108 and is printed in the Appendix hereto, at page 13 below. The opinion of the Court of Appeals for the Third Circuit, printed in the Appendix at page 18 below, is not yet reported.

JURISDICTION

The opinion of the Court of Appeals was filed April 11, 1962. A timely petition for rehearing, filed May 3, 1962, was denied on June 1, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where only six of the eight active judges of a court of appeals take part in the decision of a petition for rehearing, and four of the six vote to grant rehearing, is the petition granted or denied?

2. Is a railroad liable, under the Federal Employers' Liability Act, for failure to provide a safe place to work for its employee who is injured when, in the course of his duties, he is performing work on the car and the premises of another carrier which his employer services by agreement with that carrier?

STATUTES INVOLVED

The statutory provisions involved are 28 U.S.C. § 46(c), and 45 U.S.C. § 51.

28 U.S.C. § 46(c): Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court en banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court en banc shall consist of all active circuit judges of the circuit.

45 U.S.C. § 51: Every common carrier by railroad while engaging in commerce between any of the several States or Territories or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF CASE

Petitioner filed suit in the District Court for the Western District of Pennsylvania on November 21, 1957, against respondent, Baltimore and Ohio Railroad Company (hereafter "B. & O") and against the Pittsburgh and Lake Erie Railroad Company hereafter ("P. & L.E.") (1a) The jurisdiction of the District Court was invoked because the case arises under the Federal Employers' Liability Act. Petitioner was employed, at the time of his injury, as a baggageman by the B. & O. at its Mahoningtown Station in New Castle, Pa. At that station there are tracks of the B. & O. and of the P. & L.E., and also a station of the P. & L.E. The station of the P. & L.E. was unmanned and the B. & O. ticket agent sold tickets to P. & L.E. passengers. (122a) The P. & L.E. had no employees at the station. (18a) By an arrangement between the two railroads (11a), B. & O. employees would service P. & L.E. trains stopping at Mahoningtown and running on P. & L.E. tracks. (97a)

Although petitioner was employed by the B. & O., paid by it, and subject only to the authority of B. & O. supervisory employees (75a), part of his duties were to load and unload baggage in P. & L.E. trains, as well as B. & O. trains, and to perform janitor work in both the B. & O. and the P. & L.E. stations. (74a) On October 15, 1956, petitioner was engaged in loading mail sacks on a P. & L.E. train. Both he and the baggage car attendant, a P. & L.E. employee, attempted to open the door on the P. & L.E. car to its full width (21a), but were unable to open it more than 18 or 24 inches. (18a) The baggage car attendant had reported the defective condition of the door to his superiors, but they had failed to repair it.

(21a, 42a) The mail sacks being loaded were 31 inches wide and 37 inches deep. (18a) Plaintiff was compelled to exert unusual pressure, twisting the bags and endeavoring to force them through the small opening. In so doing he injured his back. (23a)

The trial court directed a verdict for the P. & L.E., finding it was not petitioner's employer within the Federal Employers' Liability Act, and there was no diversity to support a common law claim. (122a) The jury returned a verdict for petitioner against the B. & O. of $40,000. (3a) Motion for judgment n.o.v. was denied (122a) On appeal by the B. & O., the judgment of the district court was reversed, in an opinion by Judge Goodrich, with whom Judge Ganey joined. Judge Kalodner dissented with opinion. Petitioner petitioned for a rehearing. The petition was denied, per Goodrich and Ganey, JJ., with Judges Biggs, Kalodner, Staley, and Smith dissenting from the denial of rehearing. Judges Hastie and McLaughlin took no part on the motion for rehearing.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below that rehearing is denied when four of six participating judges vote to grant rehearing presents a question of importance to the courts of appeals in the administration of their judicial business. Cf. United States v. American-Foreign S.S. Corps., 363 U.S. 685, 687 (1960).

The decision can be justified only on a reading of the statute, 28 U.S.C. § 46(c), which ignores all considerations other than the literal words. It is true that at the time of decision there were eight judges in active service on the Court of Appeals for the Third Circuit, and only four voted to grant rehearing, while the statute says rehearing en banc may be ordered "by a majority of the circuit judges of the circuit who are in active service." But this Court, in its decision first upholding the rights of the courts of appeals to sit en banc, was willing to make a "sacrifice of literalness for common sense." *Textile Mills Securities Corp. v Commissioner of Internal Revenue,* 314 U.S. 326, 334 (1941). A similar sacrifice is required here to avoid an absurd result.

In its construction of the present statute, this Court has already indicated it is not to be read literally, by specifically approving as a possible practice grant of rehearing en banc by a majority of the three judges of the original panel. *Western Pacific R. Corp. v. Western Pacific R. Co.,* 343 U.S. 247, 261 (1953). This is in fact the practice in at least one circuit. See Rule 15(e), Eighth Circuit Rules. If, consistent with the statute, the full court can delegate to the three judges of the panel the

power to order or refuse rehearing, it is equally consistent with the statute for the court to delegate this power to the six judges who participated in decision of the motion for rehearing. There are many reasons—illness, absence from the circuit, statutory disqualification—why a judge may take no part in decision on a petition for rehearing. On the view taken by the court below, a judge who does not participate in any way is counted, in effect, as if he had voted to deny rehearing. The Third Circuit itself has held, quite sensibly, that the succeeding sentence in the statute, which provides in mandatory language that "a court in banc shall consist of all active circuit judges of the circuit," is not to be read literally, and that it can hear a case en banc though one of the judges in active service is away from the circuit and not participating. *Alltmont v. United States*, 177 F.2d 971 (3d Cir. 1949). Thus if rehearing had been granted here, the case could have been heard in the absence of Judges Hastie and McLaughlin, and a vote of four-to-two for petitioner would have reinstated his judgment. Even if all the judges had participated after rehearing was ordered, and four judges had voted for petitioner on the merits, the contrary decision of the panel would be superseded and his judgment affirmed. *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers*, 294 F.2d 399 (2d Cir. 1961), affirmed 370 U.S. ..... (1962); R.C., 51 Harv.L.Rev. 1287 (1931). If it is permissible to construe "all active circuit judges of the circuit" in the final sentence of 28 U.S.C.A. § 46(c) as meaning all active circuit judges who are not disqualified or otherwise not participating, a similar construction is permissible, and required by common sense, in the preceding sentence of that statute.

2. The construction of the Federal Employers' Liability Act by the court below is in clear conflict with decisions of this Court and of other courts of appeals.

The issue is whether a railroad is liable to its employee where he is injured on the premises of a third party because a defective condition on those premises creates an unsafe place to work. The court below undertook to resolve that issue by considering whether the negligence of the third party is attributable to the employer carrier as a matter of law. It decided that it was not, in the circumstances of this case, citing as sole authority for its decision the Second Restatement of Agency. Decisions of this Court, and the courts of appeals, have made it plain that refined concepts of common-law agency have no place in the solution of the problem.

The question here is not whether the negligence of a third party can be attributed to the employer, but whether the employer is itself negligent in breaching its non-delegable duty to exercise reasonable care to furnish its employees a safe place to work. *Ellis v. Union Pacific R. Co.*, 329 U.S. 649 (1947), establishes that this duty of the carrier continues even when it requires its employees to go onto other premises to work, and that the carrier is liable though the defect was in premises over which the railroad had no control. This is the holding also of *Harris v. Pennsylvania R. Co.*, 361 U.S. 15 (1959), reversing 168 Ohio St. 582, 156 N.E.2d 822 (1959). Harris was a Pennsylvania Railroad employee who was ordered to assist in retracking two cars which had left the tracks of the Nickel Plate Railroad. He was injured because of oil on a Nickel Plate tie. There was no evidence that the

Pennsylvania placed the oil there, or knew of its existence, but Harris was permitted to recover from the Pennsylvania.

If the analysis adopted by the Third Circuit in the present case had been employed in the *Harris* case, Harris would have been denied recovery unless it were found that the Nickel Plate was an agent of the Pennsylvania and thus that the negligence of the Nickel Plate was attributable to the Pennsylvania. That is not the analysis employed by this Court, in the *Ellis* and *Harris* cases. It is not the analysis employed by at least five other circuits, which have held that when a railroad sends its employee to work on premises not under the railroad's control, it is liable if it fails to exercise reasonable care to make sure that the employee is given a safe place to work. *Atlantic Coast Line R. Co. v. Robertson*, 214 F. 2d 746 (4th Cir. 1954); *Chesapeake & O. Ry. Co. v. Thomas*, 198 F. 2d 783 (4th Cir. 1952); *Kooker v. Pittsburgh & L. E. R. Co.*, 258 F. 2d 876 (6th Cir. 1958); *Beattie v. Elgin, J. & E. R. Co.*, 217 F. 2d 863 (7th Cir. 1954); *Terminal R. Ass'n of St. Louis v. Fitzjohn*, 165 F. 2d 473 (8th Cir. 1948); *Denver & R. G. W. R. Co. v. Conley*, 293 F. 2d 612 (10th Cir. 1961).

Liability is of course dependent on lack of reasonable care, but it is settled in the cases that the railroad is under a duty to inspect premises to which it sends its employee, and that constructive knowledge will be imputed to it of a defect which would have been discoverable upon inspection. *Denver & R. G. W. R. Co. v. Conley*, 293 F. 2d 612 (10th Cir. 1961); *Chicago G. W. Ry. Co. v. Casura*, 234 F. 2d 441, 448 (8th Cir. 1956); *Van Horn v. Southern Pacific Co.*, 141 Cal. App. 2d 528, 297

P. 2d 479 (1956); *Schlueter v. East St. Louis Connecting Ry. Co.*, 316 Mo. 1266, 1282, 296 S.W. 105, 112 (1927). The evidence in the record that a P. & L. E. baggageman had earlier reported the defective condition of the door to his superiors, and that they had failed to repair it (21a, 42a), demonstrates that the defect here was one which inspection would have disclosed, and for which respondent is liable, whether or not on some nicety of agency law the knowledge of the P. & L. E. cannot be imputed directly to the B. & O.

3. The question presented is of importance in the administration of the Federal Employers' Liability Act.

The case presents no fact issue—both courts below agree that there was evidence from which the jury could have found the facts to be as petitioner claimed. But if the law is as stated by the Third Circuit, railroad employees have been deprived of much of the protection which the Act purports to give them. They will no longer be permitted any recovery under the Act for injuries suffered when their employer sends them to work on the line of another carrier. They cannot recover from the other carrier, for they are not its employees. They cannot recover from their employer in the absence of some showing that the second carrier was an agent of the employer. The Utah Supreme Court put the matter well:

> What the employee wants and needs is a reasonably safe place to perform his duties. He is not concerned with and indeed cannot know the technicalities of ownership, rental, lease or reciprocal exchange of facilities of an involved railroad system. For him to have the assurance of safety in some phases of his work and to be exposed to danger at

his own risk and responsibility in others would be contrary to reason. It might even be argued that he could better fend for himself on the master's premises where he was acquainted with his surroundings than on premises of third parties with which he is unfamiliar. The employer exercises exclusive choice both as to the place of work and control over safety factors. It is therefore not unreasonable to charge him with the duty of providing a safe place to work.

Butz v. Union Pacific R. Co., 120 Utah 185, 193, 233 P.2d 332, 336 (1951). In *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326 (1958), this Court refused to permit an employer to avoid its responsibility under the Act by engaging another railroad to perform part of its work. The decision below would permit avoidance of responsibility by sending the employees to work on another railroad.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel

August ...., 1962

APPENDIX TO PETITION

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 16438

MICHAEL SHENKER, Plaintiff

v.

THE BALTIMORE & OHIO RAILROAD COMPANY and THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY, Defendants

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Opinion and Order

Marsh, District Judge.

In this F.E.L.A. case, there was evidence from which the jury could have found the following facts: On October 15, 1956, the 49-year-old plaintiff was employed by the defendant, Baltimore and Ohio Railroad Company (B. & O.) as a baggageman, his duties, inter alia, being to assist in loading and unloading mail cars at the passenger stations of defendants, B. & O. and The Pittsburgh & Lake Erie Railroad Company (P. & L. E.), at their Mahoningtown, New Castle stations. Tracks of the P. & L. E. and tracks of the B. & O. were located between the two stations. In order to service P. & L. E. mail cars, plaintiff had to leave the B. & O. station, cross the B. & O. and P. & L. E. tracks, and go upon the platform

of the P. & L. E. station. The P. & L. E. station was unmanned. The B. & O. ticket agent sold tickets to P. & L. E. passengers; plaintiff was paid by B. & O. and was subject exclusively to that company's orders and directions.[1]

Early in the morning, plaintiff pulled his wagon or cart onto the P. & L. E. platform, stopped it in front of the doorway of the mail car on a P. & L. E. train, and proceeded to pick up the mail bags on his wagon and swing some of them through the opening of the mail car door where the P. & L. E. baggageman, Beck, received them.

On this occasion the sliding door on the P. & L. E. car would not open its full width but would open only 18 to 20 inches. When plaintiff swung a mail sack weighing 80 to 100 pounds into the narrow opening, the width of this sack prevented it from going through the opening, and he had to exert considerable extra force to push it through the narrow opening into the car. In so doing, he twisted his body and felt a snap in his back. He reported the injury promptly to the B. & O. On subsequent examination, he was found to have sustained a ruptured intervertebral disc, which eventually required a laminectomy. This injury resulted in a permanent disability.

The defendant, B. & O., moved for a directed verdict which was denied. The jury found a verdict in favor

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1. The defendant P. & L. E. was granted a directed verdict because the plaintiff did not allege or prove that he was an employee of the P. & L. E., cf. Hull v. Phila. & Reading Ry. Co., 252 U.S. 475, and because they were both citizens of Pennsylvania. Jacobson v. N. Y., N. H. & H. R. Co., 347 U.S. 909 (1954), affg. 206 F. 2d 153; DiFrischia v. New York Central R. Co., 279 F. 2d 141, 143 (3d Cir. 1960).

of plaintiff in the sum of $40,000. Defendant now moves for judgment notwithstanding the verdict.

It was the duty of defendant employer to use reasonable and ordinary care to provide plaintiff, its employee, with reasonably safe cars, appliances, and equipment in connection with his work. A failure to do so is negligence. This duty is a continuing and nondelegable one. The fact that the car was owned by and located on the tracks of another railroad does not absolve the defendant employer from liability for the injuries its employee may sustain by reason of its failure to provide him with reasonably safe cars, appliances or equipment. Cf. Kooker v. P. & L. E. R.R. Co., 258 F. 2d 876 (6th Cir. 1958); Chicago Great Western Ry. Co. v. Catura, 234 F. 2d 441 (8th Cir. 1956); Beattie v. Elgin J. and E. Ry. Co., 217 F. 2d 863 (7th Cir. 1954).

The evidence, we think, was sufficient for the jury to find with reason that the defective door created an unreasonably unsafe condition for an employee whose duty was to swing heavy mail sacks from a cart into a mail car; that it was foreseeable that this condition might cause an injury to him; and that it was negligence to fail to eliminate the unsafe condition after notice thereof prior to the accident.

In addition, there was sufficient evidence from which the jury could find with reason that this unsafe condition contributed in whole or in part to the plaintiff's injury.

Furthermore, there was evidence from which the jury could find that the unsafe condition existed for a period sufficiently long that defendant, B. & O., had constructive notice thereof. Plaintiff testified that, immedi-

ately prior to the accident and while he and Beck were trying unsuccessfully to open the door wider, he told Beck, the P. & L. E. Baggageman, that he ought to get the door fixed, and Beck replied that he had reported it for repair, but that the door had not been fixed. T., pp. 27, 28, 53.

"Inasmuch as plaintiff at the time of the accident was in a place where his assigned duties required him to be, defendant on the issue of negligence was charged with knowledge" of the condition created by the defective door "which in the exercise of reasonable care it could have ascertained." Notice of a condition rendered unsafe by a defective appliance will be imputed to the employer where it could have been discovered by reasonable inspection and by the exercise of reasonable care. Beattie v. Elgin, J. and E. Ry. Co., supra, at p. 866;[2] see also citations, supra.

The employer's duty to inspect and to repair a defective appliance creating an unreasonably unsafe condition cannot be delegated. In the case at bar, it was for the P. & L. E. to discharge that duty, and its negligence in failing to do so was the negligence of the plaintiff's employer, B. & O., as a matter of law.

We agree with the defendant that it is difficult to understand how the jury could find that the narrow opening caused by the defective door created an unreasonable risk of harm on which to predicate liability, and if it could, how the jury could find that an injury

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2. This case distinguishes Kaminski v. Chicago River & Indiana R. Co., 200 F. 2d 1 (7th Cir.), and Wetherbee v. Elgin, J. and E. Ry. Co., 191 F. 2d 302 (7th Cir.), relied upon by defendant.

could reasonably be foreseen; however, those issues, as well as the other issues mentioned, were for the jury. Lavender v. Kurn, 327 U.S. 645; Rogers v. Missouri Pacific R. Co., 352 U.S. 500; Sano v. Pennsylvania R. Co., 282 F. 2d 936 (3d Cir. 1960); and cases cited supra.

An order will be entered denying the defendant's motion for judgment n.o.v.

ORDER OF COURT

AND NOW, to-wit, this 8th day of August, 1961, after argument and upon due consideration of the parties' briefs it is ordered, adjudged and decreed that The Baltimore and Ohio Railroad Company's "Motion for Judgment N.O.V." be and the same hereby is denied.

(signed) Rabe F. Marsh
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 13,755

MICHAEL SHENKER
v.
THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, and THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY, a Corporation
THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellant

Appeal From the United States District Court for the Western District of Pennsylvania.

OPINION OF THE COURT OF APPEALS

(Filed April 11, 1962)

Argued February 21, 1962

Before GOODRICH, KALODNER and GANEY, *Circuit Judges.*

By GOODRICH, *Circuit Judge.*

The plaintiff recovered a judgment against the defendant, The Baltimore and Ohio Railroad (B&O), in a suit under the Federal Employers' Liability Act, 45 U.S.C.A. §§51-60. The incident which is the basis of the plaintiff's complaint took place in a railroad yard at New Castle, Pennsylvania, where the B&O and The Pittsburgh & Lake Erie Railroad Company (P&LE) have adjoining parallel tracks. Each railroad has its own waiting room in this railroad yard, but only the B&O maintains a ticket

office. Tickets for P&LE passengers are sold at the B&O ticket window in the B&O station on the B&O side of these tracks. The plaintiff was a B&O employee whose duties included wheeling a loaded mail truck across the B&O tracks to the tracks of the P&LE, and loading the mail into a P&LE car. On the night in question plaintiff had brought his loaded truck to the door of the P&LE mail and baggage car. He claims that the door of this car stuck and that in endeavoring to force a large bag through the narrow opening of the car he wrenched his back and suffered the injuries complained of. Since the jury found in his favor his version of what happened must be taken to be accurate.

The court below was not completely happy with the verdict. See 196 F. Supp. 108 (W.D. Pa. 1961). He said that he agreed "with the defendant that it is difficult to understand how the jury could find that the narrow opening caused by the defective door created an unreasonable risk of harm on which to predicate liability . . . " Nevertheless, being familiar with the decisions in this field, he did not interfere with the jury's verdict.

Our difficulty comes from one point which the court passed over rather lightly. He said:

> "The employer's duty to inspect and to repair a defective appliance creating an unreasonably unsafe condition cannot be delegated. In the case at bar, it was for the P. & L.E. to discharge that duty, and its negligence in failing to do so was the negligence of the plaintiff's employer, B. & O., as a matter of law."

Our trouble comes in seeing how the negligence of the P&LE, if any, in having a defective door, became

attributable to the B&O as a matter of law. As the judge himself pointed out in addressing counsel during the trial of the case: "We have no contract in evidence. All we know is that the B&O Railroad was serving the P&LE trains by their baggage man." The car alleged to be defective belonged to P&LE. Nothing appears to show us that the B&O had any control whatever over the car or any employees of the P&LE. We do not know that the B&O became the agent of the P&LE, nor, indeed, as the trial court pointed out, anything more than that a B&O employee hauled the truck over to the P&LE tracks and put the bags in the car.

If the P&LE was the employer of the B&O in this kind of a transaction we do not see any basis for attributing the negligence of the employer to the employee who had no notice of the defect and who had no control over what its "principal" did. As is stated in comment *b* to section 350 of the Second Restatement of Agency:

> "The knowledge of another agent or of the principal does not affect the liability of the agent. Thus, an agent who has no reason to know that the instrumentalities which he uses are not suitable for the work . . . is not liable for harm caused by reason of that fact."

The Supreme Court decision in *Sinkler v Missouri Pac. R.R.*, 356 U.S. 326 (1958), is relied upon by the plaintiff. We think whatever impact that case has upon our situation tends to establish liability on the part of the P&LE and not the B&O.

The P&LE was initially joined in this suit. The judge dismissed the action against it on two grounds: (1) that no diversity of citizenship was shown; and (2) that there

was no employee-employer relationship between the plaintiff, Shenker, and the P&LE.

To conclude: There was not the slightest evidence of any actual want of care to its employees on the part of the B&O; and, second, we see no basis whatever for attributing any negligence on the part of the P&LE to the plaintiff's employer.

The judgment of the district court will be reversed.

KALODNER, *Circuit Judge,* dissenting

I would affirm the judgment of the District Court entered in favor of the plaintiff pursuant to the jury's verdict in his favor.

I agree with the District Court's holding, stated in its Opinion denying defendant's motion for judgment n.o.v., that "The evidence . . . was sufficient for the jury to find with reason that the defective door created an unreasonably unsafe condition for an employee whose duty was to swing heavy mail sacks from a cart into a mail car; that it was foreseeable that this condition might cause injury to him; and that it was negligence to fail to eliminate the unsafe condition after notice thereof prior to the accident", and that "Furthermore, there was evidence from which the jury could find that the unsafe condition existed for a period sufficiently long that defendant, B. & O., had constructive notice thereof." 196 F. Supp. 108.

On this appeal defendant does not even contend that the trial judge in his charge to the jury failed to adequately instruct it with respect to the law relating to any of the aspects or elements of the negligence charged by plaintiff against defendant. The record discloses that

not only did the defendant not except to the charge to the jury but that in response to the Court's question, addressed to trial counsel, "Gentlemen, have I misstated anything?" defendant's response was "No, Your Honor."

The majority premises its reversal of the District Court's denial of defendant's motion for judgment n.o.v. on its view that "There was not the slightest evidence of any actual want of care to its employees on the part of the B&O; and, second, we see no basis whatever for attributing any negligence on the part of the P&LE to the plaintiff's employer."

The sum of the majority's position is that the evidence failed to establish that defendant breached a duty to plaintiff. I disagree.

The record discloses that the P&LE did not maintain any employees at its Newcastle station;[1] defendant's employees serviced P&LE trains operating on its tracks which stopped at its station;[2] and plaintiff was assigned by defendant to load and unload P&LE mail and baggage cars. It was during a mail loading operation that plaintiff was injured by reason of a defective door of a P&LE mail car. Evidence was adduced that P&LE had been earlier advised that the door was defective.

These principles are well settled: It is the duty of a railroad to use reasonable care to furnish its employees with a safe place to work;[3] " . . . the standard of care

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1. Plaintiff's Interrogatory No. 17 and defendant's Answer thereto.

2. Paragraph 4, Stipulation at trial.

3. Bailey v. Central Vermont Ry., 319 U.S. 350, 352 (1943); Sano v. Pennsylvania Railroad Company, 282 F.2d 936, 937 (3 Cir. 1960).

must be commensurate to the dangers of the business;"[4] the fact that a railroad does not own, maintain or control the premises on which its employee is injured in the course of his employment does not relieve it of its legal duty to provide its employees with a safe place to work, nor does it absolve it from liability for injuries sustained by its employees because of unsafe condition of the premises.[5]

These instances of application of the principles stated are relevant here:

A railroad switchman was injured when the engine on which he was riding passed over a faulty section of track which broke causing him to be thrown to the ground. The track in question was neither owned nor maintained by the railroad which employed the switchman. The jury returned a verdict against the employing railroad. In affirming, the appellate court held that the absence of the elements of ownership or control of the premises on which the switchman was injured in the course of his employment did not relieve the employing railroad of its legal duty to provide him with a safe place to work; that "the duty the law imposed upon the railroad to inspect the tracks over which it moves its trains imputes to it constructive knowledge of the unsafe condition." Denver and Rio Grande Western Railroad Company v. Conley, 293 F.2d 612, 613 (10 Cir. 1961):

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4. Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 67 (1943).

5. Denver and Rio Grande Western Railroad Company v. Conley, 293 F.2d 612, 613 (10 Cir. 1961); Chicago Great Western Railway Company v. Casura, 234 F.2d 441, 447 (8 Cir. 1956); Beattie v. Elgin, Joliet & Eastern Railway Co., 217 F.2d 863, 865 (7 Cir. 1955).

A railroad switchman was injured in the course of performing his duties when struck by a defective gate on the property of a packing company which the railroad served. A jury verdict in favor of the injured employee against the employing railroad was affirmed even though it did not own or control the premises where the accident occurred. Chicago Great Western Railway Company v. Casura, 234 F.2d 441, 447 (8 Cir. 1956):

A railroad switchman was injured when in the course of performing duties assigned to him by his railroad employer he slipped on oil or grease on the steel platform of a coal dumper owned and maintained by the United States Steel Corporation on its property. A jury verdict in favor of the injured switchman against the railroad was affirmed on the appellate court's holding that the railroad's "knowledge, actual or constructive, of the allegedly dangerous condition of the place where the accident occurred was a question for the jury." Beattie v. Elgin, Joliet and Eastern Railway Co., 217 F.2d 863, 867 (7 Cir. 1955).

In the instant case the majority directed its attention to the status—agency or otherwise—which obtained or didn't obtain between defendant and P&LE relating to the servicing by defendant of P&LE's facilities, i.e. mail car.

In my opinion the question of the status referred to is academic. Assuming arguendo that defendant acted as a volunteer Good Samaritan in giving neighborly aid to P&LE in servicing its mail cars and not as a result of some contractual arrangement, the duties imposed by law on defendant to provide plaintiff a safe place to work would not be affected, one way or the other.

Principles of agency adverted to by the majority play no role nor do they have any impact in the situation here. Plaintiff's action against defendant is premised solely on an employer-employee relationship and a breach of the duty imposed by that relationship and not on any principal-agent status.

Assuming arguendo, as the majority did, that there existed a principal-agent relationship between P&LE and defendant, the impact of the agency principles pertaining to such relationship on plaintiff's case would be subject to the teaching of the Supreme Court that "Plainly an accommodating scope must be given to the word 'agents' to give vitality to the standard governing the liability of carriers to their workers injured on the job." Sinkler v. Missouri Pacific Railroad Co., 356 U.S. 326, 330 (1958). In *Sinkler* a railroad employee's injury was caused in whole or in part by the fault of an independent contractor performing operational activities of the carrier. It was nevertheless held that the independent contractor was an "agent" of the railroad within the meaning of the FELA.

In *Sinkler* the Supreme Court further said (p. 329):

> "However, in interpreting the FELA, we need not depend upon common-law principles of liability. This statute, an avowed departure from the rules of the common law, cf. Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 507-509, was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54. The cost of human injury, an inescapable expense of

railroading, must be borne by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier. Kernan v. American Dredging Co., 355 U.S. 426, 431, 438."

Finally, the majority's reversal of the District Court's denial of defendant's motion for judgment n.o.v. requires reference to the holding in Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 506 (1957) that:

"Under this statute [FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. . . . Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that the negligence of the employer played any part at all in the injury or death."[6]

For the reasons stated I would affirm.

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6. Zegan v. Central Railroad of New Jersey, 266 F.2d 101, 102 (3 Cir. 1959).

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: GOODRICH, KALODNER and GANEY, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the WESTERN District of PENNSYLVANIA and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs.

April 11, 1962

SUR PETITION FOR REHEARING

Present: BIGGS, *Chief Judge,* and GOODRICH, KALODNER, STALEY, GANEY and SMITH, *Circuit Judges.*

After due consideration the petition for rehearing in the above-entitled case is hereby denied. BIGGS, *Chief Judge,* and KALODNER, STALEY and SMITH, *Circuit Judges,* dissenting.

BY THE COURT
GOODRICH
Circuit Judge

Dated: June 1, 1962

IN THE

Supreme Court of the United States

October Term, 1962

No. 414

MICHAEL SHENKER,
Petitioner

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI:

Counter-Statement of Questions Presented 1

Counter-Statement of the Case 2

Argument:

1. Was the Petition for Rehearing Properly Denied by the Circuit Court in Accordance With Its Rules of Procedure? 5

2. Is a Railroad Liable Under the Federal Employers' Liability Act for Failure To Provide a Safe Place To Work for Its Employee Who Claims To Have Been Injured When in the Course of His Duties He Is Performing Work on the Baggage Car of Another Carrier, the Employer Railroad Having No Control Whatever Over the Train of the Baggage Car Involved and No Opportunity at Any Time To Inspect the Said Train or Car Prior to the Alleged Injury and Where There Was No Evidence of Any Relationship Between the Two Railroads so as To Make the Employer Railroad the Agent of the Other Carrier? 7

TABLE OF CITATIONS

CASES:

Atlantic Coast Line v. Robertson, 214 F. 2d 246 12

Beattie v. Elgin J. & E. Railroad Company, 217 F. 2d 863 13

Butz v. Union Pacific Railroad Company, 120 Utah 185, 233 P. 2d 332 17

Chesapeake & Ohio Railway Company v. Thomas, 198 F. 2d 783 12

Chicago G. W. Railway Company v. Casura, 234 F. 2d 441 14

Ellis v. Union Pacific Railroad Company, 329 U.S. 649, 91 L. Ed. 572 9

Denver & Rio Grande Railroad Company v. Conley, 293 F. 2d 612 14

Grand Trunk Western Railroad v. Boylen, 81 F. 2d 91 13

Harris v. Pennsylvania Railroad Company, 361 U.S. 15, 4 L. Ed. 2d 1 ..... 10, 11

Kooker v. Pittsburgh & Lake Erie Railroad Company, 258 F. 2d 876 12

Sinkler v. Missouri Pacific Railroad Company, 356 U.S. 326 2 L. Ed. 2d 799 ..... 16, 17

Terminal Railroad Association of St. Louis v. Fitzjohn, 165 F. 2d 473 13

Wetherbee v. Elgin, Joliet and Eastern Railroad Company, 191 F. 2d 302 16

MISCELLANEOUS:

Rule 33 of the Rules of the United States Court of Appeals for the Third Circuit .. 5, 6

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1962

No.

Michael Shenker,
Petitioner,
v.
The Baltimore and Ohio
Railroad Company,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Was the Petition for rehearing properly denied by the Circuit Court of Appeals in accordance with its Rules of Procedure?

2. Is a railroad liable under the Federal Employers' Liability Act for failure to provide a safe place to work for its employee who claims to have been injured when in the course of his duties he is performing work on the baggage car of another carrier, the employer railroad having no control whatever over the train or the baggage car involved and no opportunity at any time to inspect the said train or car prior to the alleged injury and where there was no evidence of any relationship between the two railroads so as to make the employer railroad the agent of the other carrier?

COUNTER-STATEMENT OF THE CASE

This is an action under the Federal Employers' Liability Act instituted by Michael Shenker as plaintiff, petitioner herein, against The Baltimore and Ohio Railroad Company, his employer. Later, the plaintiff joined The Pittsburgh & Lake Erie Railroad Company as a defendant. The Trial Judge directed a verdict in favor of The Pittsburgh & Lake Erie Railroad Company for two reasons. First, lack of diversity of citizenship (87a) and secondly, no employer-employee relationship between Shenker and The Pittsburgh & Lake Erie Railroad Company so as to bring the case under the Federal Employers' Liability Act (119a). A judgment was entered in favor of The Pittsburgh & Lake Erie Railroad Company from which judgment no appeal was taken. During the trial, the Trial Judge withdrew from the consideration of the jury any reference to an alleged contract between the two railroads for the use of the train facilities at New Castle, Pennsylvania (96a). The case against The Baltimore and Ohio Railroad Company was submitted to the jury which found a verdict in favor of the plaintiff, Michael Shenker, in the amount of $40,000. Judgment n.o.v. having been refused by the court below, an appeal was taken which resulted in the reversal of the judgment by the Court of Appeals (App. 27). The plaintiff, Michael Shenker, petitioned for a rehearing which was denied (App. 27).

Michael Shenker, age 53, was employed by The Baltimore and Ohio Railroad Company, hereinafter at times referred to as the B&O Railroad Company, from five and

a half to six years, and at the time of the alleged accident was a baggage man, mail man and caller at its New Castle, Pennsylvnia, Station (20a). He had worked for about four months on this particular job (70a). On October 15, 1956, the facilities at New Castle consisted of two waiting rooms; one for the B&O and the other for The Pittsburgh & Lake Erie Railroad, hereinafter at times referred to as the P&LE, with separate tracks and one ticket office, which is the property of the B&O Railroad Company; all employees at this combination station are B&O employees (96a-97a). In other words, the P&LE has two sets of tracks and a waiting room and the B&O has two sets of tracks, a waiting room and a ticket office.

On October 15, 1956 at about 12:25 a.m., Shenker pulled his mail truck over to what is known as the P&LE Station and spotted the truck where he thought the train would come in, and waited for the train (17a, 20a and 21a). Passenger train, known as No. 79, operated by the P&LE Railroad Company on the P&LE tracks, and headed west to Youngstown, Ohio, came in to the P&LE Station (15a). Mr. Shenker had twenty to twenty-five bags of mail on his truck: some of them weighing twenty-five to fifty pounds and others eighty to one hundred pounds (22a, 23a). He testified that the opening in the baggage car door of Train No. 79 was twenty to twenty-four inches (63a). Shenker claimed that he hurt his back in placing the mail bags in this car. After he had unloaded his cart, he reported to the B&O Ticket Agent that he hurt his back, but he made no report as to the condition of the door on the baggage car. He refused to permit the agent to call the company doctor or to take him to the hospital, and finished his tour of duty (68a and 69a). There is no set time limit during which the mail had to be unloaded because the train is

required to stay at the station until that work is taken care of (70a). Mr. Shenker claimed that he spoke about the door to Edward William Beek, the baggage man employed by the P&LE who was inside the baggage car involved in the case, and that Mr. Beck said to do the best he could and that he would have to report to have the door fixed (21a). Mr. Beck testified that he did not recall anything wrong with the door, nor having said anything about the door to Mr. Shenker. So far as he recalled, the door worked all right, and that on different runs he made on No. 79 he never had a bad door (100a and 102a).

ARGUMENT

First Question:

I. WAS THE PETITION FOR REHEARING PROPERLY DENIED BY THE CIRCUIT COURT IN ACCORDANCE WITH ITS RULES OF PROCEDURE?

Respondent, The Baltimore and Ohio Railroad Company, contends that the Court of Appeals for the Third Circuit properly denied the Petition for rehearing. Regardless of the composition of the Court to which the Petition and Answer in Opposition thereto were presented, the method of procedure is stated in the Rules of the said Court, particularly Rule 33, which provides as follows:

> "A petition for rehearing may be filed with the clerk of this court within 15 days after judgment is entered, unless the time is enlarged by order of the court. It must be printed, and briefly and distinctly state its grounds, and be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay. Such *a petition is not subject to oral argument and will not be granted, unless a judge who concurred in the judgment desires it, or the court or the division which rendered it so determines.*"

An examination of the Order of Court (App. 27) discloses that the Petition for Rehearing was considered by six of the eight judges of the Court, namely: Chief Judge

Biggs, Judges Goodrich, Kalodner, Staley, Ganey and Smith. The Petition was denied, with Judges Biggs, Kalodner, Staley and Smith dissenting; and Judges Goodrich and Ganey voting to refuse the Petition. It is to be noted that the division of the Court which rendered the original judgment were Judges Goodrich, Kalodner and Ganey. The majority opinion was written by Judge Goodrich, with Judge Ganey concurring and Judge Kalodner dissenting.

Under Rule 33, it is submitted that either the entire Court, or the division which rendered the original judgment, or one of the concurring judges, must determine or desire a rehearing. It is obvious from the record the entire Court did not desire a rehearing (App. 27). A majority of the *entire Court* did not desire a rehearing. The division of the Court which rendered the judgment did not desire a rehearing, nor a judge who concurred in the judgment. Not one judge who heard the original argument changed his mind. Judge Goodrich and Judge Ganey stood by their original opinion and voted against any rehearing. Judge Kalodner still dissented. The other judges who dissented were strangers to the proceedings.

We submit that the granting, or refusal, of a petition for rehearing is governed by the Rule of the Court of Appeals for the Third Circuit. The petition for a rehearing was denied, and properly denied, by the Court of Appeals for the Third Circuit.

Second Question:

2. IS A RAILROAD LIABLE UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT FOR FAILURE TO PROVIDE A SAFE PLACE TO WORK FOR ITS EMPLOYEE WHO CLAIMS TO HAVE BEEN INJURED WHEN IN THE COURSE OF HIS DUTIES HE IS PERFORMING WORK ON THE BAGGAGE CAR OF ANOTHER CARRIER, THE EMPLOYER RAILROAD HAVING NO CONTROL WHATEVER OVER THE TRAIN OF THE BAGGAGE CAR INVOLVED AND NO OPPORTUNITY AT ANY TIME TO INSPECT THE SAID TRAIN OR CAR PRIOR TO THE ALLEGED INJURY AND WHERE THERE WAS NO EVIDENCE OF ANY RELATIONSHIP BETWEEN THE TWO RAILROADS SO AS TO MAKE THE EMPLOYER RAILROAD THE AGENT OF THE OTHER CARRIER?

The Petitioner has suggested that the construction of the Federal Employers' Liability Act by the court below is in conflict with decisions of this Court and of other courts of appeal. It is respectfully submitted that there is a great distinction between the case at bar and the cases referred to by the petitioner. In all of them, there was an element in addition to the mere presence of the employee on the property or premises of a third person. The case at bar is unusual in that there is of record nothing to show the relationship, if any, between the B&O Railroad Company and the P&LE Railroad Company at the Station involved. The Court of Appeals found no negligence on the part of the B&O Railroad Company and this finding is sustained by the testimony. If there was any negligence at all, and that is questionable, it was the

negligence of the P&LE Railroad Company in permitting a car to be used when its door could not be opened more than 24 inches. There was absolutely no testimony of any defect in the door nor, in fact, as to the cause of the failure of the door to open more than 24 inches. There was no attempt to show any defective condition of the cart which Mr. Shenker was using nor of the railroad tracks nor the grounds nor, of anything else.

This train which was owned and operated by the P&LE Railroad Company came into the P&LE Station and was there just long enough for Mr. Shenker to unload and load the mail. There was no opportunity for any employee of the B&O Railroad Company to inspect the train or the door of the baggage car at any time before it arrived at the Station. When the train did arrive, the only B&O employee who had anything to do with the train was Mr. Shenker. He testified to the alleged defect, if it might be so called, in the door, and then decided to go ahead and load the car. To say that the B&O Railroad Company was required to inspect this car before it came into the Station would be to place an impossible duty on the railroad. Just because one of its employees was to load mail on a baggage car would not justify the railroad in stopping the train of another carrier on that carrier's tracks and demand the right to inspect it before it came into the combination-station, nor can the railroad be charged with notice because it did not do this impossible thing. It was not the intention of the Federal Employers' Liability Act to make the employer an insurer of the employee's safety whether on its own premises or that of another. There still must be some evidence of negligence, and to try to impute the alleged negligence of one railroad to another in the absence

of some contract of agency would be stretching the interpretation of the Act to an absurd result. This is what the petitioner would have this Court do—hold the B&O Railroad Company responsible for the alleged negligence of the P&LE Railroad Company when it had absolutely no opportunity to inspect the car excepting what was disclosed to Mr. Shenker himself at the time he decided to go ahead and load even though the door would not open more than 24 inches.

A brief reference will not be made to the federal case cited by the petitioner with which he claims the decision of the court below is in conflict.

Ellis v. Union Pacific Railway Company, 329 U.S. 649, 91 L. Ed. 572. In this case, it was found that the nearness of the track to the building created an unsafe place to work and that:

> "Though the Engineer was an experienced railroad worker thoroughly familiar with this particular spur and though it was his duty to watch petitioner continuously or stop the engine, he failed either to warn petitioner or to stop the train in time to avert the tragedy." (page 651).

In the *Ellis* case, we have the act of negligence of a fellow employee causing the injury, not the mere presence of the petitioner on the property of a third person. This case affirms the proposition that the Federal Employers' Liability Act does not make the employer the insurer of the safety of his employees while on duty but that the basis of his liability is negligence which must be in whole or in part the cause of the injury.

Harris v. Pennsylvania Railroad Company, 361 U.S. 15, 4 L. Ed. 2d 1. The Court of Appeals of Ohio had been reversed by the Ohio Supreme Court, which in turn was reversed by this Court in the case above referred to. To ascertain the facts upon which the finding of negligence was based, we make several pertinent references to the Opinion of the Court of Appeals of Ohio. Henry J. Harris, plaintiff, was a member of the "wreck train crew" of the Pennsylvania Railroad Company. He was called in the night to join his "wreck train crew" in up-righting two overturned boxcars on the property of the Nickel-Plate Railroad Company. Rain and sleet were falling, and according to Harris's testimony there was mud, grease, and oil on the railroad ties. In the course of his work, plaintiff asked help to extract a block under one of the outriggers which supported the derrick car used in raising boxcars. The block was one foot wide, one-half foot thick, four feet long, and weighed about one hundred pounds. It had sunk into the mud four or five inches. The Court found that the plaintiff's foreman saw that it was difficult for one man to cope with this situation, but that nevertheless he said to the plaintiff, "You are a big strong man—we are busy. Hurry up." In order to attempt to raise the block, plaintiff had to stand on the cross tie. As the block jumped out of the mud and he was about to place it on his shoulder, his foot slipped and caused him to injure his back. The next day the section foreman saw grease "where we keep the switches lubricated."

The Ohio Court of Appeals made the statement, "It is common knowledge that the foot on the lower level under these circumstances would carry the greater weight, and that the foot on the tie, by reason of the resulting imbal-

ance, would be likely to slip on the mud and grease or oil." The tie in question was raised five inches above the ground. The Court found that the defendant, Pennsylvania Railroad Company, was negligent in requiring him to proceed alone in lifting the block under these circumstances. It said, "Yet the foreman who saw, or in the exercise of reasonable care should have seen this hazardous situation, permitted him to continue without help or warning him as to the danger facing him." And further, the Ohio Court said, "Defendant should have anticipated the plaintiff injuring himself when he was required to stand with one foot on the tie raised five inches above the ground and covered with mud and grease or oil, and the other foot on the ground tugging at the heavy timber imbedded in the ground. Defendant's foreman should have either ordered assistance for him or provided that the mud and grease or oil be removed or its sliminess reduced in some way."

From the foregoing excerpts it is quite apparent that the negligence with which the Pennsylvania Railroad Company was charged was the negligence of the crew foreman who was its own employee. Whether this accident had occurred on the property of the Pennsylvania Railroad Company, or of any other railroad or corporation, the result should have been the same. For the negligence of its own foreman, the Pennsylvania Railroad Company would be liable. The facts of the *Harris* case are entirely different from those in the *Shenker* case, and a careful reading of both will show that the *Harris* case does not apply to the *Shenker* case. In the case at bar there is no negligence of any superior of Michael Shenker. He was working alone at the time of the alleged injury.

Atlantic Coast Line R. Co. v. Robertson, 214 F. 2d 746 (C.C.A. 4). In this case, judgment was entered against both a pipe line company and a railroad. One of the distinctions between the *Robertson* case and the case at bar is that the railroad maintained the cars and the track on the pipe line company's premises and naturally would have some control over them. At page 751, the Court says:

> "The conditions prevailing in the yard at the time of the accident were not sporadic or unusual, but customary and continuous; and hence there was substantial basis for the finding that the Railroad Company failed to exercise ordinary care to provide for the safety of its employee when it directed him to perform the duties of car inspector in the area."

Chesapeake & Ohio Railway Company v. Thomas, 198 F. 2d 783 (C.C.A. 4): At page 786, we find that it is admitted that Hudson who was acting as fireman at the time of the accident had seen the standpipe fouling the track sixty days prior to the accident, at which time he was moving a single box car with Thomas, the decedent riding the leading end. Another witness testified that he had seen the standpipe fouling the track four, five or possibly six times.

It is obvious that in the *Thomas* case like the *Robertson* case that these conditions were "customary and continuous" and that they were known to the employees of the railway company, both at the time of the accident and prior thereto. These facts clearly distinguish these cases from the case at bar.

Kooker v. Pittsburgh & Lake Erie, 258 F. 2d 876 (C.C.A. 6): In this case, the plaintiff's car was parked in a parking lot provided by the railroad company. In order

to get to work, he had to go over a path on the property of a third person. The Court decided that whether defendant exercised dominion over the path on where the accident occurred should have been submitted to the jury. In the case at bar, the B&O Railroad Company exercised no dominion over the railroad tracks, train or cars of the P&LE Railroad Company either at the time of the accident or prior thereto.

Beattie v. Elgin, J. & E. R. Company, 217 F. 2d 863 (C.C.A. 7): In this case, the Court found at page 866 that "the evidence would justify the jury in finding this unsafe condition had existed frequently and recurringly for such a long time that defendant had constructive notice thereof." The Opinion then refers to *Grand Trunk Western Railroad v. Boulen*, 81 F. 2d 91-94, to the effect that "If such dangerous condition had been there sufficiently long so that defendant, in the exercise of ordinary care, ought to have known of its presence, a finding is well justified that it did not provide a reasonable safe place for working." It will be observed that the element of "time" enters into constructive notice. In the case at bar, there is no time element for the simple reason, as above indicated, that this train came into the station after Mr. Shenker had spotted his truck by the track and the only B&O employee who had any knowledge of the condition of the car was Shenker himself.

Terminal R. Association of St. Louis v. Fitzjohn, 165 F. 2d 473 (C.C.A. 8): In this case, there was a contract between the railroad and the Government relative to the moving of cars into the Ordnance plant. The side of the ramp next to the track on which the cars were standing consisted of a concrete wall. In this wall had been placed

several iron pipes or standards on the top of which electric lights were mounted. These standards were only about six inches from the side of a box car standing on or moving along the adjacent track. It was conceded by all that the clearance between the side of a box car on this track and these standards was wholly inadequate to permit a person riding on the side ladder of the box car to pass the standards without being knocked off or crushed between the side of the car and one of the standards. Plaintiff riding a car was severely injured. In that case, it was a permanent, "customary and continuous" condition which was conceded by all to be a dangerous condition. The railroad employees moving cars into the plant most certainly knew of this condition and their knowledge should be held to be the knowledge of the railroad company. There is a vast difference between a permanent and dangerous condition and the temporary presence of an alleged defective car in the railroad station in the case at bar.

Denver & R.G.W.R. Company v. Conley, 293 F. 2d 612 (C.C.A. 10): In this case, the plaintiff was thrown to the ground due to a faulty section of track. There was proof that the rail had become dangerously deteriorated after more than 30 years, and it was held that the railroad had a duty to *inspect tracks upon which it moves its trains*. The distinction is obvious between this case and the case at bar, where the tracks, train and cars were P&LE property.

Chicago G.W. Ry. Co. v. Casura, 234 F. 2d 441 (C.C.A. 8): In this case, judgments against the railroad and a meat packer were sustained when a switchman employed by the railroad was injured. A car moving on a spur track on the meat packer's premises came in contact with

a wooden gate and caused the gate to strike the railroad foreman who was walking along the track. The railroad company had been performing switching services for many years at the plant and in the adjacent stock yards of the meat packer. One of the items of negligence was that the railroad was pulling the cars along the track and through the gate at an unsafe and negligent rate of speed. As to the condition of the gates, the Court found at page 448:

> "In the instant case an inspection of these gateways would have disclosed that the iron bars which were utilized to hold the gates open simply rested on the flat surface of the cement and there were no holes in this surface into which the ends of the drop bars could be placed. It was also clear from an inspection that the gates were not otherwise held open and that they might readily have been held safely in an open position by hook and eye devices, or by providing holes in the cement to receive the ends of the bars. An inspection would also have shown that the bars were bent at the ends. No such inspection was made by the railway company and we think the jury, under the evidence, viewed in a light most favorable to the plaintiff, was warranted in believing not only that the place where plaintiff was required to work was not a safe place, but that the railway company failed to exercise ordinary care to discover the unsafeness of the place in which plaintiff was required to work and to use ordinary care to have it made into a reasonably safe place."

Here again we have a case where the condition was "not sporadic or unusual but customary and continuous." The railway company had the opportunity of inspecting

and failed to do so. In the case at bar, the B&O Railroad Company had no opportunity to inspect a condition which was, to say the least, unusual. The case at bar is more like that of *Wetherbee v. Elgin, Joliet & Eastern Railway Company*, 191 F. 2d 302 (C.C.A. 7), where the plaintiff was injured by a derailment caused by a board being left on the track. In that case, the Court found that the board was "a new threat" to safety, not something about which the railroad had previous knowledge.

Sinkler v. Missouri Pacific R. Co., 356 U.S. 326, 2 L. Ed. 2d 799: In the *Sinkler* case, the Houston Belt Railway Company was switching a car of the Missouri Pacific and caused the Missouri Pacific car to collide with another railroad car, injuring an employee of the Missouri Pacific. The Supreme Court pointed out that the Missouri Pacific owned one half of the stock, elected one half of the Directors of the Houston Belt Railway Company, and there was a contract by the terms of which a third person, here the Houston Belt Railway Company, performed switching operations for the employer. The jury answered a special Interrogatory and said that the Houston Belt Railway Company was under the control of the Missouri Pacific. Further, it was pointed out by the Supreme Court that switching is a vital operational activity of railroading and that at the time of the accident, the Houston Belt Railway Company was engaged in furthering the operational activities of the Missouri Pacific. Based upon these facts, it was held that the Houston Belt Railway Company was an agent of the Missouri Pacific and that the negligence of the Houston Belt was imputable to the employer. In the case at bar, The P&LE was not performing any operational activities for the B&O. Further, there was no contract between the two railroads. The Trial Judge specifi-

cally ruled out evidence of any contract and there is nothing to show any relation between the railroads. The *Sinkler* decision is just not applicable to the instant case.

Butz v. Union Pacific R. Co., 120 Utah 185, 233 P. 2d 332, upholds the position taken by Respondent, at page 344: "An employer is charged with responsibility for conditions of danger upon property of others of which employer has actual knowledge or is charged with constructive knowledge *because the hazard is of such nature and has existed for sufficient time that in exercise of reasonable care employer should have discovered it.*" This *Butz* case, as well as several of those above referred to, all require that before there can be constructive knowledge of a defective condition, the condition must have exceeded for a defective condition, the condition must have existed for a sufficient time that the employer should have discovered it. As we have said several times in this Brief, the B&O Railroad Company, employer of Michael Shenker, had no time whatever to discover the allged defect in the baggage car.

The law as stated by the Court of Appeals for the Third Circuit does not deprive any employee of the protection afforded him by the Federal Employers' Liability Act. It is just as necessary to protect the Railroads from judgments for which they are not legally liable as it is to protect the employee. To make the railroad liable simply because it sends a man to the premises of a third person to work, would make it an insurer of his safety and this Court has repeatedly said that such is not the intent of the Act. In fact, even if he is injured on premises of the employer, it is entitled to the benefit of the law which requires at least some slight evidence of negligence on it's

part before it can be held guilty of a violation of a duty it owed the employee.

In his Petition, the plaintiff's counsel makes this statement relative to recovery by persons sent to work on the line of another carrier. "They cannot recover from the other carrier, for they are not its employees." We respectfully submit that this is not a correct assumption. They can recover from the third party on whose premises they were injured if they prove negligence on the part of that third party, that is they have their right of action at common law. In the case at bar, this plaintiff joined the third party, namely, The Pittsburgh & Lake Erie Railroad Company as a defendant. Had it not been for the fact that there was no diversity between the P&L.E Railroad Company and the plaintiff, he would have had his recovery against that Railroad provided he proved negligence. He did not see fit to bring a cautionary suit in the State Court which would have preserved his right to proceed against The P&L.E Railroad Company. Therefore, he cannot complain now that he has no right of recovery against the said third party.

The question of law is of grave importance to the defendant, Respondent herein, and the Court of Appeals has correctly decided it. To hold otherwise would make the railroad an insurer and this is not the intent of the Act of Congress. We respectfully contend that the writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NO. 414

OCTOBER TERM, 1962

MICHAEL SHENKER, Petitioner,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONER

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INDEX

	PAGE
Citations to Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement of the Case	4
Summary of the Argument	6
Argument:	
I. When a majority of the judges participating vote to grant rehearing en banc, such rehearing should be granted	7
II. The Federal Employers' Liability Act imposes on an employer a non-delegable duty to exercise reasonable care to furnish its employees a safe place to work, even when they are off the employer's premises, and constructive knowledge will be imputed to the employer of any defect which would have been discoverable upon inspection	11
Conclusion	19

TABLE OF CITATIONS

CASES

Alltmont v. United States, 177 F.2d 971 (3d Cir. 1949) 9

Atlantic Coast Line R. Co. v. Robertson, 214 F.2d 746 (4th Cir. 1954) 13

Bailey v. Central Vermont Ry., Inc., 319 U.S. 350 (1943) 12

Beattie v. Elgin, J. & E. R. Co., 217 F.2d 863 (7th Cir. 1954) 13, 16

Butz v. Union Pacific R. Co., 120 Utah 185, 233 P.2d 332 (1951) 15

Table of Cases.

CASES	PAGE
Chesapeake & O. Ry. Co. v. Thomas, 198 F.2d 783 (4th Cir. 1952)	13
Chicago G. W. Ry. Co. v. Casura, 234 F.2d 441 (8th Cir. 1956)	17
Chicago G. W. Ry. Co. v. Smith, 228 F.2d 180 (8th Cir. 1955)	17
Denver & R. G. W. R. Co. v. Conley, 293 F.2d 612 (10th Cir. 1961)	13, 17
Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers, 294 F.2d 399 (2d Cir. 1961), affirmed 370 U.S. 254 (1962)	10
Ellis v. Union Pacific R. Co., 329 U.S. 649 (1947)	12
Harris v. Pennsylvania R. Co., 361 U.S. 15 (1959)	12, 18
Harris v. Pennsylvania R. Co., 168 Ohio St. 582, 156 N.E.2d 822 (1959)	12
Kooker v. Pittsburgh & L. E. R. Co., 258 F.2d 876 (6th Cir. 1958)	13, 14, 18
Payne v. Baltimore and Ohio R. Co., 309 F.2d 546, 549 (6th Cir., 1962)	13, 15, 18
Schlueter v. East St. Louis Connecting Ry. Co., 316 Mo. 1266, 296 S.W. 105 (1927)	16
Sinkler v. Missouri Pacific R. Co., 356 U.S. 326 (1958)	15
Terminal R. Ass'n of St. Louis v. Fitzjohn, 165 F.2d 473 (8th Cir. 1948)	13
Textile Mills Securities Corp. v. Commissioner of Internal Revenue, 314 U.S. 326 (1941)	7
United States v. American-Foreign S.S. Corp., 363 U.S. 685 (1960)	7
Van Horn v. Southern Pacific Co., 141 Cal.App.2d 528, 297 P.2d 479 (1956)	17
Western Pacific R. Corp. v. Western Pacific R. Co., 345 U.S. 247 (1953)	8, 9

Statutes and Authorities.

STATUTES	PAGE
28 U.S.C. § 46(c)	2, 6, 7, 8, 9, 11
28 U.S.C. § 47	9
45 U.S.C. § 51	2, 4, 12

OTHER AUTHORITIES

Eighth Circuit Rules, Rule 15	8
H. R. 3498, 79th Cong., 1st Sess.	9
H. R. 7124, 79th Cong., 2d Sess.	9
Louisell & Degnan, Rehearing in American Appellate Courts, 25 F.R.D. 143 (1960)	10
Note, En Banc Procedure in the Federal Courts of Appeals, 111 U.Pa.L.Rev. 220 (1962)	8, 10
R.C., 51 Harv.L.Rev. 1287 (1931)	10

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BRIEF FOR PETITIONER

CITATIONS TO OPINIONS BELOW

The opinion of the trial judge, denying defendant's motion for judgment notwithstanding the verdict (R. 78-80) is reported at 196 F.Supp. 108. The opinion of the Court of Appeals for the Third Circuit (R. 82-88) is reported at 303 F.2d 596.

JURISDICTION

The opinion of the Court of Appeals was filed April 11, 1962. A timely petition for rehearing, filed May 3, 1962, was denied on June 1, 1962. By order of the Chief Justice, the time for filing the petition for writ of certiorari was extended to September 14, 1962 (R. 91). Such

petition was filed September 5, 1962, and granted November 19, 1962 (R. 91). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where only six of the eight active judges of a court of appeals take part in the decision of a petition for rehearing, and four of the six vote to grant rehearing, is the petition granted or denied?

2. Is a railroad liable, under the Federal Employers' Liability Act, for failure to provide a safe place to work for its employee who is injured when, in the course of his duties, he is performing work on the car and the premises of another carrier which his employer services by agreement with that carrier?

Statutes Involved

The statutory provisions involved are 28 U.S.C. § 46(c), and 45 U.S.C. § 51.

28 U.S.C. § 46(c): Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

45 U.S.C. § 51: Every common carrier by railroad while engaging in commerce between any of the several States or Territories or between any of the States and

Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF THE CASE

Petitioner filed suit in the District Court for the Western District of Pennsylvania on November 21, 1957, against respondent, Baltimore and Ohio Railroad Company (hereafter "B. & O.") and against the Pittsburgh and Lake Erie Railroad Company (hereafter "P. & L.E.") (R. 1). The jurisdiction of the District Court was invoked because the case arises under the Federal Employers' Liability Act, 45 U.S.C. § 51.

Petitioner was employed, at the time of his injury, as a baggageman by the B. & O. at its Mahoningtown Station in New Castle, Pa. At this point the eastbound and westbound tracks of the B. & O. are immediately north of the eastbound and westbound tracks of the P. & L.E. The B. & O. station is north of the four tracks. A station of the P. & L.E. is to the south, between the two P. & L.E. tracks (R. 21). The P. & L.E. station is unmanned (R. 15). The B. & O. ticket agents sold tickets at the B. & O. station to P. & L.E. passengers (R. 15). By an arrangement between the two railroads (R. 10), B. & O. employees would service P. & L.E. trains stopping at Mahoningtown and running on P. & L.E. tracks (R. 61-62). Although petitioner was employed by the B. & O., paid by it, and subject only to the authority of B. & O. supervisory employees (R. 29, 46), his duties included loading and unloading baggage in P. & L.E. trains, as well as B. & O. trains, and janitor work in both the B. & O. and the P. & L.E. stations (R. 29, 45).

On October 15, 1956, petitioner was engaged in loading mail sacks on a P. & L.E. train. Both he and the baggage car attendant, a P. & L.E. employee, attempted to open the door on the P. & L.E. car to its full width

(R. 17), but were unable to open it more than 18 or 24 inches (R. 18, 36-37). The baggage car attendant, a P. & L.E. employee (R. 63), had reported the defective condition of the door to his superiors, but they had failed to repair it (R. 17, 26). The mail sacks being loaded were as large as 31 inches wide and 37 inches deep (R. 14). The larger sacks filled with mail weighed 80 to 100 pounds (R. 18). To get these large sacks through the 20 inch opening in the door, petitioner was compelled to exert unusual pressure, twisting the bags and endeavoring to force them through the small opening. In so doing he injured his back (R. 18). On subsequent examination, he was found to have sustained a ruptured intervertebral disc, which eventually required a laminectomy, and resulted in permanent disability (R. 79).

The trial court directed a verdict for the P. & L.E., finding it was not petitioner's employer within the Federal Employers' Liability Act, and that there was no diversity to support a common law claim (R. 78). The jury returned a verdict for petitioner against the B. & O. for $40,000 (R. 3). Motion for judgment n.o.v. was denied (R. 78-81).

On appeal by the B. & O., the judgment of the district court was reversed, in an opinion by Judge Goodrich, with whom Judge Ganey joined. Judge Kalodner dissented with opinion (R. 82-89). Petitioner petitioned for a rehearing. The petition was denied, per Goodrich and Ganey, JJ., with Judges Biggs, Kalodner, Staley, and Smith dissenting from the denial of rehearing. Judges Hastie and McLaughlin took no part on the motion for rehearing (R. 90).

SUMMARY OF THE ARGUMENT

I. The policy of the statute permitting rehearings en banc in the courts of appeals is to provide that the active circuit judges shall determine the major doctrinal trends of the future for their court. This purpose is not served if a decision must stand though a majority of the participating judges believe rehearing en banc should be granted. Only an overly-literal reading of the statute, 28 U.S.C. § 46(c), can justify such a result, and past decisions establish that this statute need not be read with such a debilitating literalness.

II. The Court of Appeals thought that the issue was whether the negligence of P. & L.E. could be imputed to the respondent B. & O. In fact respondent should be held liable for its own negligence, rather than for the imputed negligence of someone else. Respondent was under a continuing non-delegable duty to exercise reasonable care to provide a safe place to work. This duty exists even though the employee is required to perform duties on the premises of someone else. In the exercise of reasonable care, respondent could, by inspection or otherwise, have known of the defective door which led to petitioner's injury. It is chargeable, therefore, with constructive knowledge of the defect, and with negligence for failure to exercise reasonable care to provide petitioner with a safe place to work.

ARGUMENT

I.

When a majority of the judges participating vote to grant rehearing en banc, such rehearing should be granted.

At the time in question, there were eight judges in active service on the Court of Appeals for the Third Circuit. Six judges participated in decision of the petition for rehearing en banc. Four judges voted to grant the petition. Two judges voted to deny the petition. On those facts, it was held that the petition was denied, on the ground that "a majority of the circuit judges of the circuit who are in active service" had not voted to grant the petition, as seemingly required by 28 U.S.C. § 46(c). Such a holding may be supported by the literal language of the statute, but this is a statute which has not been, and should not be, read literally, when, as here, the result is contrary to the purpose of the statute.

In its first decision upholding the right of the courts of appeals to sit en banc, this Court said that it was willing to make a "sacrifice of literalness for common sense." *Textile Mills Securities Corp. v. Commissioner of Internal Revenue,* 314 U.S. 326, 334 (1941). A similar sacrifice is required here to avoid an absurd result. The evident policy of 28 U.S.C. § 46(c), this Court has said, is to provide that the active circuit judges shall determine the major doctrinal trends of the future for their court. *United States v. American-Foreign S.S. Corp.,* 363 U.S. 685, 690 (1960). This purpose is effectively thwarted if a decision can stand as the decision of the court of appeals though four of the six judges who have

considered the matter are dissatisfied with it. What precedential value would such a decision have? Should district judges within the circuit follow the decision when it is apparent on the face of the Federal Reporter that there is a substantial likelihood that a different result will be reached in the future if the same question should come on before a different panel of the court of appeals, or even before the full court? Such difficult questions are avoided if the statute is construed sensibly to mean that a majority of the participating judges are to prevail, as is the case with every other matter coming before a federal appellate court.

This Court has already indicated that § 46(c) is not to be read literally, by specifically approving as a possible practice grant of rehearing en banc by a majority of the three judges of the original panel. *Western Pacific Corp. v. Western Pacific R. Co.*, 345 U.S. 247, 261 (1953). This is in fact the practice in at least one circuit. See Rule 15(e), Eighth Circuit Rules; Note, *En Banc Procedure in the Federal Courts of Appeals*, 111 U.Pa.L.Rev. 220 (1962). If, consistent with the statute, the full court can delegate to the three judges of the panel the power to order or refuse rehearing, it is equally consistent with the statute for the court to delegate this power to the six judges who participated in decision of the motion for rehearing. There are many reasons—illness, absence from the circuit, statutory disqualification—why a judge may take no part in decision on a petition for rehearing. On the view taken by the court below, a judge who does not participate in any way is counted, in effect, as if he had voted to deny rehearing. Suppose, for example, that the proceedings

in the district court in this case had been conducted by one of the nonparticipating judges of the court of appeals, sitting in the district court by assignment. There is an absolute statutory bar against such a judge participating in decision of the appeal. 28 U.S.C. § 47. Yet under the practice followed below, that judge would be counted as if he had voted to deny rehearing of the decision reversing his own judgment.

The construction which has been put on the second sentence of § 46(c) is instructive. In the first legislative draft of what is now § 46(c), the second sentence read: "A court in banc shall consist of all active judges present and available in the circuit." H.R. 3498, 79th Cong., 1st Sess. In the next draft, H.R. 7124, 79th Cong., 2d Sess., this language was changed to the form in which it was adopted, so that it read: "A court in banc shall consist of all active circuit judges of the circuit." Yet this Court has said that the two drafts "did not differ in any material respect," *Western Pacific R. Corp. v. Western Pacific R. Co.*, 345 U.S. 247, 254 (1953), and the Third Circuit has held that the second sentence is not to be read literally, and that it can hear a case en banc even though one of the judges in active service is away from the circuit and not participating. *Alltmont v. United States*, 177 F.2d 971 (3d Cir. 1949). It is incongruous to read the second sentence sensibly, in the face of legislative history which would seem to suggest that Congress deliberately excluded such a reading, while at the same time making a fortress of the dictionary in construing the first sentence of the same statute.

Under the rule in the *Alltmont* case, if rehearing had been granted here, the case could have been heard

in the absence of Judges Hastie and McLaughlin, and a vote of four-to-two for petitioner would have reinstated his judgment. If all eight judges had participated after rehearing was ordered, and four judges had voted for petitioner on the merits, the contrary decision of the panel would be superseded and his judgment affirmed. *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers,* 294 F.2d 399 (2d Cir. 1961), affirmed 370 U.S. 254 (1962); R.C., 51 Harv.L.Rev. 1287 (1931); Note, 111 U.Pa.L.Rev. 220, 229-230 (1962). Yet he is here held to have lost when four judges voted in his favor on the petition for rehearing. The leading students of rehearing practices point to "a constant and understandable tendency on the part of judges * * * to blend the question of granting rehearing with the question of correctness of the prior decision." Louisell & Degnan, *Rehearing in American Appellate Courts,* 25 F.R.D. 143, 159 (1960). To the extent that the vote of four judges in favor of rehearing reflects, even in part, a determination by them that the decision of the panel was wrong and that the judgment below should have been affirmed, the situation is indistinguishable from that presented after rehearing has been granted, where four votes for petitioner would have resulted in affirmance of the judgment. We do not press that argument, however, for at a minimum, the vote of the four judges surely demonstrates their unwillingness to have the decision of the panel, without further consideration, set the law of the Third Circuit for the future. When a majority of the participating judges evidence such dissatisfaction with a decision, the purpose of the rehearing en banc statute demands that the rehearing be granted, and the language of the statute is not to the contrary.

If it is permissible to construe "all active circuit judges of the circuit" in the final sentence of 28 U.S.C. § 46(c) as meaning all active circuit judges who are not disqualified or otherwise not participating, a similar construction is permissible, and required by common sense, in the preceding sentence of that statute.

II.

The Federal Employers' Liability Act imposes on an employer a non-delegable duty to exercise reasonable care to furnish its employees a safe place to work, even when they are off the employer's premises, and constructive knowledge will be imputed to the employer of any defect which would have been discoverable upon inspection.

The issue on the merits in this case is whether a railroad is liable to its employee where he is injured on the premises of a third party because a defective condition on those premises creates an unsafe place to work. The court below undertook to resolve that issue by considering whether the negligence of the third party is attributable to the employer carrier as a matter of law. It decided that it was not, in the circumstances of this case, citing as sole authority for its decision the Second Restatement of Agency. 303 F.2d at 598. Decisions of this Court, and the courts of appeals, have made it plain that refined concepts of common-law agency have no place in the solution of the problem.

The question here is not whether the negligence of a third party can be attributed to the employer, but whether the employer is itself negligent in breaching its non-delegable duty to exercise reasonable care to furnish

its employees a safe place to work. It is settled that the Federal Employers' Liability Act, 45 U.S.C. § 51, imposes such a duty on the employer, and that the duty is a continuing one which is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent. *Bailey v. Central Vermont Ry., Inc.*, 319 U.S. 350, 353 (1943). It is settled, too, that the duty continues even when the carrier requires its employees to go onto other premises to work, and that the carrier is liable though the defect was in premises over which the railroad had no control. *Ellis v. Union Pacific R. Co.*, 329 U.S. 649 (1947).

The most recent case from this Court in point is *Harris v. Pennsylvania R. Co.*, 361 U.S. 15 (1959), reversing 168 Ohio St. 582, 156 N.E.2d 822 (1959). Harris was a Pennsylvania Railroad employee. He was ordered out as a member of a wrecking crew to assist in retracking two cars which had left the tracks of the Nickel Plate Railroad. He was injured because of oil on a Nickel Plate tie. There was no evidence that the Pennsylvania placed the oil there, or knew of its existence. In the view of the Ohio Supreme Court, this was enough to defeat liability:

> Surely the defendant can hardly be held to the duty of going over the premises of another railroad with a fine tooth comb to discover every imperfection thereon before sending its employees there to do a job for which they have been trained and where they might expect to meet conditions to be found in the operation of railroads generally.

168 Ohio St. at 587, 156 N.E.2d at 826. Two dissenters in this Court took a similar position. 361 U.S. at 27. But

the majority of this Court held that on these facts the jury could, with reason, find that employer negligence played a part in producing the injury, and reinstated Harris's judgment against the Pennsylvania.

If the analysis adopted by the Third Circuit in the present case had been employed in the *Harris* case, Harris would have been denied recovery unless it were found that the Nickel Plate was an agent of the Pennsylvania and thus that the negligence of the Nickel Plate was attributable to the Pennsylvania. That is not the analysis employed by this Court, in the *Ellis* and *Harris* cases. It is not the analysis employed by the other circuits, which have held repeatedly that when a railroad sends its employee to work on premises not under the railroad's control, it is liable if it fails to exercise reasonable care to make sure that the employee is given a safe place to work. *Atlantic Coast Line R. Co. v. Robertson*, 214 F.2d 746 (4th Cir. 1954); *Chesapeake & O. Ry. Co. v. Thomas*, 198 F.2d 783 (4th Cir. 1952); *Payne v. Baltimore and Ohio R. Co.*, 309 F.2d 546 (6th Cir. 1962); *Kooker v. Pittsburgh & L. E. R. Co.*, 258 F.2d 876 (6th Cir. 1958); *Beattie v. Elgin, J. & E. R. Co.*, 217 F.2d 863 (7th Cir. 1954); *Terminal R. Ass'n of St. Louis v. Fitzjohn*, 165 F.2d 473 (8th Cir. 1948); *Denver & R. G. W. R. Co. v. Conley*, 293 F.2d 612 (10th Cir. 1961). In the *Terminal Railroad Association* case, for example, the plaintiff was injured while working on premises owned and controlled by the United States. He was paid by the railroad but worked full time on government property on a government engine. It was held that he was still an employee of the railroad, within the Act, and that the railroad was liable where conditions on the premises owned by the government created an unsafe place to

work. Again in the *Kooker* case the injury, as in the present case, occurred at a point where tracks of the B. & O. parallel tracks of the P. & L.E. Kooker, an employee of the P. & L.E., was walking on a customary path across the tracks when he slipped on ice and was injured. The Sixth Circuit described evidence from which the jury could have found that Kooker slipped on a portion of the path under the dominion of the P. & L.E., but went on to say that this was not necessary:

> But the duty of an employer to provide his servants with a safe place to work is not so circumscribed and there are many federal cases which hold that the obligation of an employer may extend beyond its premises and to property which third persons have a primary obligation to maintain.

258 F.2d at 878.

Any other rule would deprive railroad employees of much of the protection which the Act purports to give them. On the view taken by the Third Circuit, an employee required to work on the line of another carrier, could not recover under the Act from the other carrier, because he is not an employee of that carrier. He could not recover from his own employer in the absence of some showing that the second carrier was an agent of the employer. It is true, as respondent has suggested, that such an employee would still have a common law right of action against the other carrier, but the Federal Employers' Liability Act is premised on a belief that common law remedies are not adequate protection for railroad employees.

The fatal flaw in the agency analysis made by the Third Circuit has been well exposed by the Utah Supreme Court:

> What the employee wants and needs is a reasonably safe place to perform his duties. He is not concerned with and indeed cannot know the technicalities of ownership, rental, lease or reciprocal exchange of facilities of an involved railroad system. For him to have the assurance of safety in some phases of his work and to be exposed to danger at his own risk and responsibility in others would be contrary to reason. It might even be argued that he could better fend for himself on the master's premises where he was acquainted with his surrounding than on premises of third parties with which he is unfamiliar. The employer exercises exclusive choice both as to the place of work and control over safety factors. It is therefore not unreasonable to charge him with the duty of providing a safe place to work.

Butz v. Union Pacific R. Co., 120 Utah 185, 193, 233 P.2d 332, 336 (1951). The Sixth Circuit has recently expressed a similar view:

> Under FELA the employer is the one owing the duty to the employee. The employee need not look elsewhere for his protection. He has a right under FELA to rely on his employer and none other. When the employer delegates its duty, or abdicates its control, the employer takes the risk, not the employee.
>
> *Payne v. Baltimore and Ohio R. Co.*, 309 F.2d 546, 549 (6th Cir. 1962)

In *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326 (1958), this Court refused to permit an employer to

avoid its responsibility under the Act by engaging another railroad to perform part of its work. The decision below would permit avoidance of responsibility by sending the employees to work on another railroad.

The sound view, amply supported by the authorities already cited, is that the duty of the employer is the same when he requires his employee to work on the premises of another as it is when the employee is working on the employer's premises. This duty is one of reasonable care, but it is settled in the cases that constructive knowledge will be imputed to the employer, and thus want of reasonable care found, if the defect on the premises to which the employee is sent would have been discoverable upon inspection. The case most frequently cited for this proposition is *Beattie v. Elgin, J. & E. R. Co.*, 217 F.2d 863, 866 (7th Cir. 1954), where the court said:

> Inasmuch as plaintiff at the time of the accident was in a place where his assigned duties required him to be, defendant on the issue of negligence was chargeable with knowledge of the conditions which in the exercise of reasonable care it could have ascertained.

This is not, however, the only case nor even the earliest case in point. In *Schlueter v. East St. Louis Connecting Ry. Co.*, 316 Mo. 1266, 1282, 296 S.W. 105, 112 (1927), many cases are cited and discussed in support of the proposition that a railroad company which runs its engines and trains over tracks owned by another company is bound to know and to see that those tracks are in a reasonably safe condition for use by its own employees, and that constructive knowledge of the defective track

will be attributed to the employer when the evidence shows that the employer should, or could by the exercise of ordinary care, have known of the defective condition. A state court, in *Van Horn v. Southern Pacific Co.*, 141 Cal.App.2d 528, 297 P.2d 479, 481-482 (1956), relied on the *Beattie* case, above, for the proposition that "respondent had the duty to inspect the pathway and to warn appellant of any dangerous condition thereon of which respondent had knowledge, either actual or constructive." In *Chicago G. W. Ry. Co. v. Casura*, 234 F.2d 441, 448 (8th Cir. 1956), the court recognized a duty to inspect the premises to which an employee is sent, and said that a railroad must use "ordinary care to discover the unsafeness of the place in which plaintiff is required to work and to use ordinary care to have it made into a reasonably safe place." To the same effect see *Chicago G. W. Ry. Co. v. Smith*, 228 F.2d 180, 184 (8th Cir. 1955), and *Denver & R. G. W. R. Co. v. Conley*, 293 F.2d 612, 613 (10th Cir. 1961).

The failure of the door to open more than two feet, the defect which caused petitioner's injury, was in fact known to the P. & L.E. and thus could, by inspection, have been discovered by the respondent B. & O. Just before petitioner was injured, he talked about the door with the P. & L.E. baggageman inside the car he was loading. The baggageman told him that he had earlier reported the defective condition of the door to his superiors, and that they had failed to repair it (R. 17, 26).

Respondent has argued heretofore that the rule which we have described is applicable only where the defect away from the employer's premises is of a customary and continuous condition, and does not apply

where the employee is injured by a sporadic or unusual defect. There is no such rule. Surely the grease on the tie which caused Henry Harris to fall was not a customary and continuous condition. Indeed the evidence was very slim on which it was found that there was grease on the tie at all. Yet Harris was permitted to recover. *Harris v. Pennsylvania R. Co.*, 361 U.S. 15 (1959). It is beyond belief that the ice and snow on which Donald Kooker slipped was a customary and continuous condition, but he too was allowed to recover. *Kooker v. Pittsburgh & L.E. R. Co.*, 258 F.2d 876 (C.A. 6th, 1958). The accumulation of ashes which caused the derailment in which Ralph Payne died was caused by rain during the night preceding the accident. *Payne v. Baltimore and Ohio R. Co.*, 309 F.2d 546, 548 (6th Cir. 1962). The length of time the defect has existed is a factor which the jury will consider in determining whether the employer could, with reasonable care, have discovered it, but that is all it is. Here the jury has considered the matter and determined that respondent should, in the exercise of reasonable care, have been aware of the defective door which led to petitioner's injuries. Respondent is, therefore, liable, whether or not on some nicety of agency law the actual knowledge of the P. & L.E. can be imputed directly to the B. & O.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed, either with directions to reinstate the judgment of the trial court for petitioner, or to grant rehearing en banc in the court of appeals.

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In the Supreme Court of the United States

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF RESPONDENT.

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TABLE OF CONTENTS.

Statutes Involved 1

Questions Presented 2

Statement of the Case 2

The Nature of Petitioner's Case 3

Petitioner's Place of Work 3

Petitioner's Duties 4

Petitioner's Employment Status 4

The Accident 6

The Defective Car 7

No Appeal from Directed Verdict for P&LE 7

The Third Circuit's Denial of Rehearing 8

Summary of Argument 9

Argument 11

I. Since Less Than a Majority of the Active Judges of the Court Below Voted to Grant a Rehearing En Banc, Denial Thereof Was Proper and Probably Mandatory 11

A. Denial of Rehearing Was Mandatory Under Rule 33 of the Third Circuit 11

B. The Third Circuit's En Banc Procedure Is Proper Under the Decisions of This Court, and Probably Mandatory Under the Statute 13

This Court's Interpretation of the Statute 14

The Statute's Legislative History 15

The Alltmont Case 18

II. The Negligence of the P. & L. E. Was Not Imputable to the B. & O., Which Had No Notice of the Defective Door and Was Therefore Not Itself

Negligent; Petitioner Has Abandoned His F. E. L. A. Rights Against the P. & L. E. 20

A. Introduction 20

B. The Scope of Respondent's Duty to Petitioner 21

The "Operational Activities" Case 22

To Impose Liability on Respondent, It Must Be Shown Either (a) That It Created the Defect; (b) That It Had Actual Knowledge of Its Existence; or (c) That It Had Been in Existence Long Enough to be Discovered By It 23

Cases Where Railroad Had No Notice 26

Cases Involving Direct Evidence of Railroad Knowledge 27

Cases Involving Hazards of a Permanent or Long-Standing Nature 28

The Railroad Had No Knowledge or Notice Here 32

C. For Want of Evidence and Failure to Appeal, Petitioner Has Abandoned His F. E. L. A. Rights Against the P. & L. E. 33

The Loaned Servant Doctrine 34

The "Operational Activities" Doctrine 36

Conclusion 38

TABLE OF AUTHORITIES.

Cases.

Ackermann v. U. S., 340 U. S. 193 (1950) 38

Alltmont v. U. S., 177 F. 2d 97 (C. A. 3d, 1949) 18

Atlantic C. L. R. Co. v. Collins, 235 F. 2d 805 (C. A. 4th, 1956), cert. den. 352 U. S. 942, reh. den. 352 U. S. 982 24

Atlantic C. L. R. Co. v. Robertson, 214 F. 2d 746 (C. A. 4th, 1954) 29

Atlantic Coast Line R. Co. v. Tredway, 120 Va. 735, 98 S. E. 560 (1917) 36

Bailey v. Central Vermont Ry. Co., 319 U. S. 350 (1943) 21

Beattie v. Elgin J. & E. R. Co., 217 F. 2d 863 (C. A. 7th, 1954) 29, 32, 33

Bishop v. Bishop, 257 F. 2d 495, reh. den. 257 F. 2d 501 (C. A. 3d, 1958) cert. den. 359 U. S. 914 (1959) 13

Brady v. Southern R. Co., 320 U. S. 476 (1943) 21

Brown v. Dravo Corp., 258 F. 2d 704, reh. den. 258 F. 2d 709 (C. A. 3d, 1958); cert. den. 359 U. S. 960 (1959) 13

Butz v. Union Pacific R. Co., 120 Utah 185, 233 P. 2d 332 (1951) 22, 30, 33

Byrne v. Pennsylvania R. Co., 262 F. 2d 906 (C. A. 3d, 1958) 35

Cafeteria & Restaurant Workers Union v. McElroy, 284 F. 2d 173 (C. A. D. C., 1960) 16

Chesapeake & O. Ry. Co. v. Thomas, 198 F. 2d 783 (C. A. 4th, 1952) 29

Chicago, G. W. Ry. Co. v. Casura, 234 F. 2d 441 (C. A. 8th, 1956) 31

Chicago & G. W. Ry. Co. v. Smith, 228 F. 2d 180 (C. A. 8th, 1955) ---- 28, 30

Denton v. Yazoo & M. V. R. Co., 284 U. S. 305 (1931) ---- 35, 37

Denver R. G. & W. R. Co. v. Conley, 293 F. 2d 612 (C. A. 10th, 1961) ---- 22

Dobson v. Grand Trunk W. R. Co., 248 F. 2d 545 (C. A. 7th, 1957) ---- 24, 27

Eddings v. Collins Pipe Co., 140 F. Supp. 622 (N. D. Cal., 1956) ---- 36

Ellis v. Union Pacific Co., 329 U. S. 649 (1947) ---- 21, 28

Erie R. Co. v. Margue, 23 F. 2d 667 (C. C. A. 6th, 1928) ---- 36

Fassbinder v. Pennsylvania R. Co., 193 F. Supp. 767 (W. D. Pa., 1961) ---- 24

Harris v. Pennsylvania R. Co., 361 U. S. 15 (1959) ---- 27

Inman v. Baltimore & O. R. Co., 361 U. S. 227 (1959) ---- 21, 23

Jones v. George F. Getty Oil Co., 92 F. 2d 255 (C. C. A. 10th, 1937) ---- 35

Kaminsky v. Chicago, R. & I. R. Co., 200 F. 2d 1 (C. A. 7th, 1952) ---- 26, 30, 31, 32

Kooker v. Pittsburgh & L. E. R. Co., 258 F. 2d 876 (C. A. 6th, 1958) ---- 29

Linstead v. Chesapeake & O. R. Co., 276 U. S. 28 (1928) ---- 34, 35

Mazzucola v. Pennsylvania R. Co., 281 F. 2d 267 (C. A. 3d, 1960) ---- 36

Miller v. Cincinnati, N. O. & T. P. Ry. Co., 203 F. Supp. 107 (E. D. Tenn., 1962) ---- 24

Murray v. Union Pacific R. Co., 77 F. Supp. 613 (D. C. Ill., 1948) ---- 5

New York, N. H. & H. R. Co. v. Henagen, 364 U. S. 441 (1960) 21, 23

Oregon Shore Line R. Co. v. Idaho Stockyards Co., 12 Utah 2d 205, 364 P. 2d 826 (1961) 36

Payne v. Baltimore & O. R. Co., 309 F. 2d 546 (C. A. 6th, 1962) 22, 31, 32, 33

Polites v. U. S., 364 U. S. 426 (1960) 38

Ringhiser v. Chesapeake & O. R. Co., 354 U. S. 901 (1957) 21

Sano v. Pennsylvania R. Co., 282 F. 2d 936 (C. A. 3d 1960) 24

Schleuter v. East St. Louis Connecting Ry. Co., 316 Mo. 1266, 296 S. W. 105 (1927) 22, 28, 31

Shaw v. Monessen S. W. Ry. Co., 200 F. 2d 841 (C. A. 3d, 1952) 35

Siegrist v. Delaware, L. & W. R. Co., 263 F. 2d 616 (C. A. 2d), cert. den. 360 U. S. 917 (1959) 24

Simpson v. Texas & N. O. R. Co., 297 F. 2d 660 (C. A. 5th, 1962) 34

Sinkler v. New York Pacific R. Co., 356 U. S. 326 (1958) 22, 36, 39

Spinello v. New York, C. & St. Louis R. Co., 173 O. S. 324, 181 N. E. 2d 884 (1962) 34

Standard Oil Co. v. Anderson, 212 U. S. 215 (1909) 34

Terminal R. Ass'n. of St. Louis v. Fitzjohn, 165 F. 2d 473 (C. C. A. 8th, 1948) 30

Terminal R. R. Assn. of St. Louis v. Kimbrel, 105 F. 2d 262 (C. C. A. 8th, 1939) 5

U. S. v. American Foreign S. S. Corp., 363 U. S. 685 (1960) 12, 14, 15, 17

Unto v. Moore-McCormack Lines, 293 F. 2d 26 (C. A. 2d, 1961) 12

Van Horn v. Southern Pacific Co., 141 Cal. App. 2d 528, 297 P. 2d 479 (1956) ---- 31

Ward v. Atlantic Coast Line R. Co., 362 U. S. 396 (1960) ---- 36

Western Pacific R. Corp. v. Western Pacific R. Co., 345 U. S. 247 (1953) ---- 14, 15, 16, 17

Wetherbee v. Elgin J. & E. Ry. Co., 191 F. 2d 302 (C. A. 7th, 1951), subsequent appeal reported in 204 F. 2d 755 (C. A. 7th, 1953), cert. den. 346 U. S. 867 (1953), reh. den. 346 U. S. 928 (1954) ---- 26, 30, 32

Wilkerson v. McCarthy, 336 U. S. 53 (1949) ---- 21

Statutes.

Federal Employers' Liability Act, Sec. 1 ---- 21, 22, 36

P. L. 87-36, § 1[b], 75 Stat. 80 ---- 12

28 U. S. C. 46(c) ---- 9, 11, 13, 14, 15, 17, 18

28 U. S. C. 46(d) ---- 2, 18

Miscellaneous.

Code of Federal Regulations, Rev. 1955, Title 39, § 92.8 ---- 37

Comment, En Banc Procedure in the Federal Courts of Appeals, 111 *U. Pa. L. Rev.* 220, 223n35. (1962) ---- 12

H. R. 3498, 79th Cong., 1st Sess. Quoted 345 U. S. at 254n. 10 ---- 16

Maris, "Hearing and Rehearing Cases En Banc," 14 F. R. D. 91 (1953) ---- 12, 13

Rules of the Third Circuit Court of Appeals, Rule 33 ---- 1, 9, 11, 13

Rules of the United States Supreme Court, Rule 40(1)(e) ---- 2

Transport Statistics in the United States, 1956, pp. 510-12 ---- 6

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BRIEF OF RESPONDENT.

STATUTES INVOLVED.

In addition to the statutes set forth in the brief of petitioner, the following are pertinent.

Rule 33 of the Rules of the Third Circuit Court of Appeals provides:

"RULE 33. Petitions for Rehearing

(1) *When Filed—Form—Oral Argument.* A petition for rehearing may be filed with the clerk of this court within 15 days after judgment is entered, unless the time is enlarged by order of the court. It must be printed, and briefly and distinctly state its grounds, and be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay. Such a petition is not subject to oral argument and will not be granted, unless a judge who concurred in the judgment desires it, or the court or the division which rendered it so determines."

28 U. S. C. § 46(d) provides:

"(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum."

QUESTIONS PRESENTED.

Petitioner's statement of the questions presented misstates the true issues. The following is a correct and accurate statement of the questions presented by this case:

(1) Is it within the power and/or discretion of a federal court of appeals to deny a petition for rehearing *en banc* when neither a majority of the 3-judge panel which originally decided the case nor a majority of all active judges of the circuit voted to grant such petition?

(2) Is a jury question of railroad negligence presented under the Federal Employers' Liability Act when plaintiff was injured in the course of his railroad duties but on the premises of another railroad and solely by reason of the defective door of a baggage car of such other railroad which defendant had no opportunity whatever to inspect, discover, or correct?

STATEMENT OF THE CASE.

As indicated by the above statement of Questions Presented, the issues this case are largely of a legal, rather than a factual, nature. Since there is comparatively little dispute as to the operative facts, petitioner's statement thereof is in the main acceptable to respondent. However, because it does require amplification in several respects, the statement which follows is intended in the interest of clarity to be a "full presentation of all that is material to the questions presented," as required by this Court's Rule 40(1) (e).

The Nature of Petitioner's Case. Petitioner's suit in the Western District of Pennsylvania proceeded to trial against two defendants, the Pittsburgh & Lake Erie Railroad Company (hereinafter "P&LE") and respondent (hereinafter sometimes "B&O"). Petitioner's action against the P&LE was brought both under the FELA, upon the theory that when injured petitioner was temporarily in its employ, and under the common law pursuant to the court's diversity jurisdiction. The action against the B&O was brought solely under the FELA.

Petitioner's Place of Work. Although the pleadings of the parties alleged that the P&LE had been permitted by the B&O to use "its tracks, station, employees, and facilities for the taking on and discharge of freight" at New Castle, Pennsylvania, and that petitioner was so engaged at the time of his injury (R. 5, 10), the proofs at trial developed a very different picture, as the trial judge recognized (R. 31). The evidence as to the nature and ownership of the two railroads' facilities at New Castle was summarized in a stipulation which was received in evidence and in effect amended the pleadings:

> "4. It is hereby stipulated that the Pittsburgh & Lake Erie Railroad Company had one westbound track and one eastbound track with a platform and waiting room at Mahoningtown, New Castle, Pa. B & O Railroad had one westbound track and one eastbound track with a platform and passenger station which station was north of the B & O tracks. No P & L E trains came over the B & O tracks. However, B & O employees would service P & L E trains stopping at Mahoningtown, New Castle, Pa., and running on P & L E tracks. The baggage carts or trucks were owned by the B & O Railroad and the employees operating the baggage cart or trucks were paid by the

> B & O Railroad. The ticket agent at the B & O station was paid by the B & O Railroad. However, he would sell some P & L E and B & O tickets." (R. 61-2.)

The record further shows that the P&LE station consisted simply of platform and public passenger waiting room, while the B&O station included a platform, waiting room, rest rooms, and a ticket office. (R. 29, 40.)

Petitioner's Duties. It was at these separate but adjacent railroad facilities that petitioner was employed. According to his own description, his duties were those of baggage man, mail man, caller, and janitor. (R. 16, 24.) As baggage and mail man his work consisted of servicing (*i.e.*, loading and unloading mail and baggage from) some five or six trains daily during the course of his 7 p. m.-7 a. m. shift. Though not entirely clear, it appears that about three or four of these were P&LE trains, while two were those of the B&O. (R. 21, 25, 47.) His duties as caller included the alerting for work of B&O train-crew members living near the station. This was done both by telephone and by personal visit to their homes. (R. 29, 45.) Petitioner's janitor work consisted of keeping both P&LE and B&O stations clean and sanitary. (R. 29, 45.) There is no record evidence as to what percentage or proportion of petitioner's time was spent on the premises or in the service of each railroad, but it was uncontradicted that his pay check came (at least in the first instance) from the B & O. With the exceptions hereafter noted, so did his work instructions. (R. 46.)

Petitioner's Employment Status. It was thus undisputed that at the time of his injury, petitioner was in the general employ of the B&O. Surprisingly, however, in view of his FELA claim against the P&LE, the record is in

a very uncertain state as regards his relationship to it, and the P&LE's relationship to the B&O. Such questions as were asked on this subject came mostly from the trial judge (*e. g.*, R. 29, 39-40, 45-6, 49-50), and no effort whatever was made by petitioner to introduce evidence as to (1) the manner in which the two carriers regulated between themselves the daily operation of the two stations; (2) how the P&LE transmitted to the B&O information as to P&LE trains requiring service; (3) what control, if any, was reserved by the P&LE to refuse the services of a particular B&O employee; or (4) how the two railroads accounted between themselves for the cost of operating the two stations. As bearing upon petitioner's status as an employee of the P&LE, however, the following may be noted.

Contrary to the assertion at page 4 of petitioner's brief* that he was subject only to the authority of B&O supervisory employees, his own testimony was uncontradicted that at the moment of his injury he was in the act of complying with instructions given him by the P&LE baggage man, who was a member of the crew of the P&LE train. He said that after he had been told by the baggage man that the door would not open to its full width, "Baggage man told me, get it out the best we could, throw mine around the corner." Again, "Well, we can't get it open, so do it the best way we can" (R. 17), which is exactly what petitioner was doing when he was hurt.

As to the relationship between the two railroads it may be judicially noted** that as of the date of petitioner's accident there was no common control by stock ownership

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* Hereafter cited as "PB ."

** *Terminal R. R. Assn. of St. Louis v. Kimbrel*, 105 F. 2d 262, 263-4 (C. C. A. 8th, 1939); *Murray v. Union Pacific R. Co.*, 77 F. Supp. 613, 614 (D. C. Ill., 1948).

or otherwise between them and they were complete strangers to each other except to the limited extent indictated by the "arrangement" at New Castle which is shown in evidence.*

The Accident. There is no dispute on this appeal concerning the manner in which petitioner was injured. Suffice it here to say that there was evidence from which the jury could and apparently did believe that the proximate cause of his injury was the defective door of baggage car on P&LE train No. 79 onto which he was loading bags of mail. To petitioner's description of this incident several pertinent facts should, however, be added.

According to the uncontradicted evidence, the operation in which petitioner was engaged when he hurt his back was the transfer of United States mail sacks from Government mail trucks to the train of the P&LE. Petitioner's *entire* testimony as to the source of the mail bags is found in the following answer:

> "A. Well the mail men brought the mail down. I loaded my mail on the truck. I got the mail loaded. I pulled it across the tracks over to the P&LE Station. I spotted my truck where I thought the train would come in and waited for the train." (R. 16.)

Petitioner nowhere clarified exactly where it was that he took delivery of the mail from the "mail men" and loaded it onto his baggage truck. He did state that he pulled the truck across the 75-80 ft. space between the B&O and P&LE stations, and it is therefore probable that the mail was delivered at the former. With the exception

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* In 1956 the P&LE was a wholly owned subsidiary of the New York Central, which was owned and managed entirely independently of the B&O. Interstate Commerce Commission, *Transport Statistics in the United States, 1956*, pp. 510-12.

of this fact, however, the record is clear that the B&O had no connection whatever with or interest in the work being done by petitioner at the time of his injury, and that such work was wholly in the service and for the benfit of the P&LE and the U. S. Post Office. This conclusion is confirmed by the fact that following his injury petitioner delivered mail which he had received from the P&LE train to the mail trucks—presumably the same ones from which the mail delivered to the train had come. (R. 18, 36.)

The Defective Car. According to the uncontradicted evidence, the railroad baggage car, the door of which was defective according to petitioner's testimony, was owned by the P&LE and traveling on its tracks, and both it and petitioner were on the premises of the P&LE at the time of petitioner's injury. Prior thereto, it had been present in the P&LE station for no longer than two or three minutes.* No effort was made to show that the B&O had ever had the car in its possession, that the B&O had notice or knowledge of the fact that the door would not open to its full width, or that such defect had existed for any particular length of time. Indeed, the *only* testimony remotely related to the duration of the defect's existence was petitioner's statement that the P&LE baggage man had "told me about having to report to get the door fixed. Never fixed it yet." (R. 17, 26.)

No Appeal from Directed Verdict for P&LE. At the close of petitioner's evidence, a motion for a directed verdict on behalf of the P&LE was granted by the trial judge on the ground that no diversity of citizenship was present

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* Petitioner was injured in the course of loading outbound mail onto the railroad car. Thereafter, inbound mail was loaded from the car onto the baggage truck. The whole operation consumed no more than five minutes. (R. 17, 18, 21, 36.)

so as to confer jurisdiction upon the court over petitioner's common law cause of action against it. Rulings were then reserved, however, with respect to motions made by both defendants for directed verdicts in the FELA causes of action asserted by petitioner. (R. 55.) At the close of all the evidence, both the latter motions were renewed, at which time the trial court granted that on behalf of the P&LE on the ground that there was insufficient evidence of an employment relationship between petitioner and the P&LE. (R. 76, 78n. 1.) However, proceeding upon the theory that the negligence of the P&LE was legally imputable to respondent (R. 59), the court permitted the FELA case against the B&O to go to the jury, which returned a verdict for petitioner in the amount of $40,000. Notwithstanding the fact that, as hereinafter demonstrated, a jury issue was probably presented with respect to whether petitioner was "employed" by the P&LE at the time of his injury, *no appeal was taken by petitioner from the trial court's action directing a verdict in favor of the P&LE.* (R. 3.)

The Third Circuit's Denial of Rehearing. The facts briefly stated in the last paragraph on page 5 of petitioner's brief are sufficient to delineate the issue (if it is an issue) with respect to the propriety of the Third Circuit's denial of a rehearing, except that it should be noted that such petition for rehearing by its terms sought a rehearing *en banc.* (Petition for Rehearing, pp. 1, 7.)

SUMMARY OF ARGUMENT.

1. This Court has held that 28 U. S. C. § 46(c) grants power to the courts of appeal to hear and rehear cases *en banc* in accordance with whatever reasonable procedure the respective circuits may find convenient. By its Rule 33, the Third Circuit has chosen to interpret the statute literally, and pursuant thereto, has uniformly denied applications for rehearing *en banc* unless an absolute majority of five of its eight active judges, or one of the judges concurring in the original three-judge decision, votes in favor thereof. Since only four judges, not including either of the concurring judges of the original panel, voted in favor of an *en banc* rehearing in the instant case, the application therefore was properly denied. Moreover, under these circumstances and in the light of the purposes of the statute disclosed by its legislative history, the Court was probably without power to grant a rehearing *en banc*. A contrary interpretation of the statute would impair the usefulness of the *en banc* procedure.

2. Petitioner has expressly conceded that his case against respondent does *not* depend upon the imputation to respondent of the negligence of the P & L E. Therefore, the only question requiring decision is whether respondent's failure to discover the defective door presented a jury issue of negligence under the FELA. Under the pertinent FELA authorities, the railroad is liable only for its negligence, and where the employee's proof shows injury by reason of defective premises or equipment, jury issues are presented only where it is shown that the railroad had knowledge or notice of the existence of the defect. In this case, it is undisputed (a) that respondent had itself no responsibility for the creation of

the defect; (b) that no employee of respondent other than petitioner had any opportunity to discover the defect; and (c) that no means were available to respondent to have discovered it by inspection. Accordingly, it was error to overrule respondent's motion for a directed verdict.

3. If petitioner had adduced the necessary proof, it is probable that he could have made out a submissible FELA case against the P&LE, since under either one or both of two parallel lines of authority, he was probably entitled to the benefits of the Act as an "employee" of the P&LE. His right to recover for personal injury was thus fully protected under the Act, but by virtue of his failure to appeal from the trial court's direction of a verdict in favor of the P&LE, he must be held to have abandoned his rights thereunder.

4. In the absence of proof of railroad negligence, it is no answer to say that the employee has the right under the FELA to rely on his employer and none other. Whenever the employee is injured on duty through the negligence of a third party and the employer is not on notice of the risk thereby created, the employee must necessarily look to the third party for vindication of his rights. A contrary rule would convert the FELA into an open-ended, jury-administered, workmen's compensation statute.

ARGUMENT.

I. SINCE LESS THAN A MAJORITY OF THE ACTIVE JUDGES OF THE COURT BELOW VOTED TO GRANT A REHEARING EN BANC, DENIAL THEREOF WAS PROPER AND PROBABLY MANDATORY.

Under the heading of Question 1, petitioner argues in effect that the favorable vote of four of the eight active judges of the court below entitled him as of right to a rehearing *en banc* before that court, and that it was without discretion to deny such rehearing. Petitioner's contentions in this regard are erroneous because (1) the denial of rehearing below was in strict accordance with both rule and practice in the Third Circuit which petitioner is without standing here to challenge; and (2) such rule and practice are not only a permissible exercise of the Court's discretionary rehearing power but also are probably required by a proper construction of 28 U. S. C. § 46(c). These reasons will be discussed in the order indicated.

A. Denial of Rehearing Was Mandatory Under Rule 33 of the Third Circuit.

In the court below, the case was heard by a 3-judge panel, a majority of which (Judges Goodrich and Ganey) reversed and entered final judgment for respondent, with a dissent being filed by Judge Kalodner. Petitioner thereupon sought a rehearing "before the entire court" (Petition for Rehearing, p. 7), thus invoking the procedure set forth in the Third Circuit's Rule 33, which provides in pertinent part as follows:

> "A petition for rehearing may be filed with the clerk of this court within 15 days after judgment is entered, unless the time is enlarged by order of the court. * * * *Such a petition is not subject to oral*

> *argument and will not be granted, unless a judge who concurred in the judgment desires it, or the court or the division which rendered it so determines.*" (Emphasis supplied.)

Under the above rule, petitioner would have been entitled to a rehearing: (1) if either of Judges Goodrich or Ganey had so voted; (2) if a majority of the original panel had so ordered; or (3) if "the court" so determined. Since Judges Ganey and Goodrich both voted to deny the petition, the only open question within the framework of the rule is whether the 4-2 vote favoring rehearing constituted a granting of the petition by "the court." A review of the Third Circuit's own interpretations of its rule makes clear that it did not.

The most thorough and concise exposition of the Third Circuit's practice with regard to rehearings is set forth in an article by Judge Albert Maris of that court entitled "Hearing and Rehearing Cases En Banc," published in 14 F. R. D. 91 (1953), recently characterized by this Court as "an enlightening discussion * * * of the thorough administrative machinery worked out by the Court of Appeals for the Third Circuit." *U. S. v. American-Foreign S. S. Corp.*, 363 U. S. 685, 688n.5 (1960). Judge Maris makes inescapably clear that the Third Circuit has uniformly interpreted the word "court" in this context to mean an absolute majority of *all* active circuit judges. See 14 F. R. D. at p. 95.* The Third Circuit decisions involv-

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* Judge Maris expresses this conclusion in terms of the *number* of judges—four—then necessary to vote a rehearing. However, his article was written at a time when the court consisted of only seven judges, rather than the eight who were appointed and active when the present petition for rehearing was denied. Since the effective date of the increase (May 19, 1961—P. L. 87-36, § 1[b], 75 Stat. 80), five rather than four votes have been required to constitute a majority. See, *e.g.*, *Unto v. Moore-McCormack Lines*, 293 F. 2d 26, 27 (C. A. 2d, 1961); *Comment*, En Banc Procedure in the Federal Courts of Appeals, 111 U. Pa. L. Rev. 220, 223n.35 (1962).

ing the practice bear Judge Maris out. *Brown v. Dravo Corp.*, 258 F. 2d 704, reh. den. 258 F. 2d 709 (C. A. 3d, 1958), cert. den. 359 U. S. 960 (1959); *Bishop v. Bishop*, 257 F. 2d 495, reh. den. 257 F. 2d 501 (C. A. 3d, 1958) cert. den. 359 U. S. 914 (1959).

Thus, a rehearing *en banc* in the present case on the basis of only four favorable votes would have represented an unprecedented departure both from the text of Rule 33 and from the court's uniform prior practice.

B. The Third Circuit's En Banc Procedure Is Proper Under the Decisions of This Court, and Probably Mandatory Under the Statute.

The Statute. The statutory provision which confers upon the court of appeals the power to hear and rehear cases *en banc* is 25 U. S. C. § 46(c), which provides as follows:

> "Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges who are *in active service*. A court in banc shall consist of all active circuit judges of the circuit." (Emphasis supplied.)

As hereinabove shown, it is the Third Circuit's practice under its Rule 33 to deny rehearing *en banc* unless an absolute majority of all active circuit judges (including any who are temporarily unavailable) vote to grant one. As Judge Maris stated, "In this respect the court follows literally the provisions of Section 46(c)." 14 F. R. D. 91, 93. Petitioner contends, however, not only that this produces an "absurd result" under the facts of the present case, but also that the court had neither power nor discretion to read the statute in such literal fashion. Neither contention is sound.

This Court's Interpretation of the Statute. Since its enactment in 1948, Section 46(c) has been before this Court twice. *Western Pacific R. Corp. v. Western Pacific R. Co.*, 345 U. S. 247 (1953); *U. S. v. American-Foreign S. S. Corp.*, 363 U. S. 685 (1960). In the *Western Pacific* case, petitioners sought a determination in this court that they were entitled as of right under the statute to a rehearing *en banc*, which had been denied by the court below. The Court held that while litigants should be left free to "suggest" that a case is appropriate for *en banc* treatment, such rehearings are *not a matter of right*. It said:

> "*In our view, § 46 (c) is not addressed to litigants. It is addressed to the Court of Appeals.* It is a grant of power. It vests in the court the power to order hearings *en banc*. It goes no further. It *neither forbids* nor requires each active member of a Court of Appeals to entertain each petition for a hearing or rehearing *en banc*. *The court is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing.*" (345 U. S. at 250; emphasis supplied.)

The courts of appeals were thus held to possess a "wide latitude of discretion" to devise "any procedure convenient to the court" (245 U. S. at 259, 259n.), including that of delegating responsibility to the original 3-man panel to "initiate" *en banc* hearings. However, this Court carefully cautioned the circuit courts to be "mindful * * * that the statute commits the *en banc* power *to the majority of the active circuit judges* * * *." (345 U. S. at 247; emphasis supplied.) It is significant that on remand to the Ninth Circuit for proceedings consistent with the opinion, that court promulgated a rule requiring approval of a majority of *both* the original panel *and* the full court

and again denied rehearing (205 F. 2d 374, 206 F. 2d 495), subsequent to which two attempts at certiorari were denied. 346 U. S. 910, 950.

In its 1960 decision in *U. S. v. American-Foreign S. S. Corp.*, 363 U. S. 685 (1960), this Court reiterated its *Western Pacific* holding that the courts of appeals are free to devise their own machinery "to provide the means whereby the majority may order a rehearing *en banc*," and held that retired judges are not included within the meaning of the phrase "active circuit judges," since until amended by Congress, those words should not be construed to mean "anything else than what they say." 363 U. S. at 689, 690-1.

The suggestion that the 4-2 vote in the court below was in effect a granting, rather than a denial, of rehearing, is therefore clearly without merit. Although the Third Circuit might have delegated the rehearing power to less than its full number, the fact is that it did not do so, preferring instead to require the favorable vote an *absolute* majority as a predicate to rehearings *en banc*. In *Western Pacific*, this Court expressly held that procedure to be within its discretionary power (*i.e.*, not "forbidden") under the statute. Moreover, since § 46(c) is addressed to the courts rather than to the parties, petitioner's rights thereunder were exhausted upon the court's rejection of his "suggestion" that a rehearing would be appropriate, and he has no standing to challenge that action here. 345 U. S. at 250, 257. For these reasons alone, petitioner's contentions must fail.

The Statute's Legislative History. However, additional and perhaps stronger support for the result below may be found in a facet of the statute's legislative history not heretofore expressly considered by this Court.

As noted in the *Western Pacific* case, *supra*, 345 U. S. 247, the original version of Section 46(c) took the following form:

> "(c) In each circuit cases shall be heard and determined by a court or division of not more than three judges unless a hearing or rehearing before the court in banc is orderd by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges *present and available* in the circuit." (Emphasis supplied.) H. R. 3498, 79th Cong., 1st Sess. Quoted 345 U. S. at 254n. 10.

Although petitioner's contentions would perhaps be well taken if the statute had been enacted in this form, the fact is that as finally enacted, the italicized phrase "present and available" was omitted from the last sentence.* Although no specific explanation of the omission appears from the legislative history, it plainly can have had no other purpose but to eliminate any possibility that the decision of an original 3-judge panel might be reheard or overturned by a court supposedly sitting "*en banc*," but which actually—because of temporary absences—consisted of something less than the full appellate bench. Nor is it difficult to understand why this objective was a legitimate matter of congressional concern. In his concurring opinion in *Cafeteria & Restaurant Workers Union v. McElroy*, 284 F. 2d 173 (C. A. D. C., 1960) Judge

* In apparent anticipation of respondent's reliance upon this aspect of the legislative history, petitioner quotes (PB 9) from the *Western Pacific* case this Court's statement that the two drafts "did not differ in any material respect." 345 U. S. at 254. However, that language can be read only as meaning that there was no difference between the two drafts *material to the questions there presented*, which did not include the issue here framed by petitioner.

Danaher* quoted as follows from a letter dated February 14, 1941, from Judge (now Chief Judge) Biggs of the Third Circuit in which he reported to Congress the recommendation of the Judicial Conference that the then pending counterpart of Section 46(c) be adopted into law:

> "* * * Judge Biggs noted that the Conference deemed it advisable that all the active and available judges of the circuit should be included 'to avoid any ground for suspicion that particular judges of the court, more than three but less than all, were selected to bring about a particular decision.' He added: '*It was to avoid the determination of decisions by a minority of judges, although in the utmost good faith, that did not represent the judgment of the court as a whole, that the measure was recommended by the Judicial Conference* * * *.'" (Emphasis supplied; 284 F. 2d at 190.)

Similar policy considerations were perceived by this Court in the *American-Foreign Steamship* case, 363 U. S. at 690, where it was said that the purpose of *en banc* procedure was to enable the active circuit judges to determine the "major doctrinal trends of the future" for their court.

It is obvious that these important purposes would not be served by a procedure which would substitute for the judgment of the original panel the decision of some number of circuit judges greater than three but less than all, since in that event the questions presented would be settled for the future with no more certainty than they were by the original panel, nor would the ground of "suspicion" envisaged by Judge Biggs be eliminated. Thus,

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*As a senator, Judge Danaher himself played an important role in the enactment of § 46(c), his remarks on hearing being quoted by this Court in the *Western Pacific* case, 345 U. S. at 252. His interpretation of the legislative history is thus of especial significance.

respondent believes not only that the Third Circuit acted within its proper discretion in denying rehearing in this case but also that the result was probably required by a correct reading of the statute.

The Alltmont Case. A word should be added concerning *Alltmont v. U. S.*, 177 F. 2d 97 (C. A. 3d, 1949), which petitioner cites (PB 9) as demonstrating inconsistent applications of the statute by the Third Circuit. The court's *en banc* opinion in that case contains dictum (occasioned apparently by the court's own doubts as to its power, rather than by the objection of either party) that under 28 U. S. C. § 46(d)* five of its then seven judges could act as a quorum of the court *en banc*, notwithstanding the last sentence of § 46(c). The inconsistency between that case and this is more apparent than real, for the actual decision in *Alltmont* was by five unanimous judges, who *were* a majority of the full active court. It is significant that the court there did *not* hold that three of its participants might render an *en banc* decision over dissents of the remaining two judges. Indeed, the denial of rehearing in the instant case makes plain that the court would have *refused* to act in the *Alltmont* case on the vote of such a simple majority, and would not have affirmed the district court here on the basis of a 4-2 vote.

From what has been said above, it is plain that the Third Circuit's rehearing procedures—far from producing an "absurd result" as contended by petitioner—actually promote the policy of the statute and foster sound judicial administration within the circuit. Petitioner makes much

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* "(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum."

of the supposed anomalies of the result—the doubts of district judges as to the binding nature of the 3-judge decision below, and speculation as to how the four judges favoring rehearing would have voted on the merits—yet imponderables such as these arise from *every* routine decision of *every* 3-judge court of appeals. Has there ever been a trial judge or appellee whose case has been reversed in a court of appeals who has not felt he might have received better treatment at the hands of a different panel? Yet instead of following the plain and eminently sound requirement of the statute, petitioner would have this Court sanction an *en banc* procedure in which the results in a given case would differ depending upon the vagaries of temporary indisposition or absence of individual judges. Manifestly, this would not achieve the finality of judicial decision which it was the purpose of the statute to promote. Accordingly, petitioner's contentions with regard to Question 1 present no ground for reversal.

II. THE NEGLIGENCE OF THE P. & L. E. WAS NOT IMPUTABLE TO THE B. & O., WHICH HAD NO NOTICE OF THE DEFECTIVE DOOR AND WAS THEREFORE NOT ITSELF NEGLIGENT; PETITIONER HAS ABANDONED HIS F. E. L. A. RIGHTS AGAINST THE P. & L. E.

A. Introduction.

Petitioner's case against respondent was submitted to the jury on the theory that it was incumbent upon respondent to furnish its employees "with reasonably safe cars, appliances and equipment, regardless of who owns them and where they might be located." (Charge of the Court trial transcript, p. 216.)* In its opinion denying respondent's motion for judgment n.o.v., the trial court, obviously recognizing the absence of any proof of negligence on the part of the B & O, attempted to justify the jury's verdict upon the theory that "it was for the P.&L.E. to discharge that duty, and its negligence in failing to do so was the negligence of the plaintiff's employer, B & O., as a matter of law." (R. 80.) Petitioner now expressly concedes, however, that the question "is not whether the negligence of a third party can be attributed to the employer, but whether the employer is itself negligent in breaching its non-delegable duty to exercise reasonable care to furnish its employees with a safe place to work." (PB 11-12.)

Respondent accepts and wholeheartedly agrees that this is the test properly applicable to this case. Respondent believes, however, that under it no jury issues were

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* The trial court's charge is not printed in the Record inasmuch as no exception was taken to it or is urged here by respondent. As hereinafter more fully appears, respondent's position in this Court is that if the proper legal test of liability had been applied by the trial court, no jury issues would have been presented. Hence the overruling of respondent's motion for a directed verdict provided ample foundation for respondent's appeal. No new trial was sought in the district court by either side.

presented, and therefore that the judgment of the court below should not be disturbed.

B. The Scope of Respondent's Duty to Petitioner.

With the issues thus narrowed, the only question remaining for the determination of this Court is whether a jury issue was presented as to respondent's negligence in failing to discover and correct the defect in the door of the P&LE baggage car. Consideration of this question requires at the outset a brief statement of the general legal principles which are applicable.

It has long been the law, of course, that railroad employers are under a duty to employ reasonable care in furnishing employees with a reasonably safe place to work and with reasonably safe cars, equipment and appliances for use therein. This duty is a common law concept imported by Congress into Section 1 of the FELA, and is not relieved by the fact that the place of injury may be off the employer's premises or infrequently or fleetingly visited by the employee. *Bailey v. Central Vermont Ry. Co.*, 319 U. S. 350, 352-3 (1943); *Ellis v. Union Pacific R. Co.*, 329 U. S. 649 (1947).

It is also the law, however, that a railroad is not the insurer of the safety of its employees, whether they be on or off its premises. There must be some proof from which the jury can infer with reason that the railroad was negligent; that is, that the injury to its employee was "a reasonably foreseeable consequence of any act or omission of the railroad." *Ringhiser v. Chesapeake & O. R. Co.*, 354 U. S. 901, 903, 905 (1957); *Brady v. Southern R. Co.*, 320 U. S. 476 (1943); *Wilkerson v. McCarthy*, 336 U. S. 53, 61-2 (1949); *New York, N. H. & H. R. Co. v. Henagen*, 364 U. S. 441 (1960); *Inman v. B&O R. Co.*, 361 U. S. 227 (1959).

Numerous cases, many of them cited by petitioner, have applied these principles to fact situations similar to a greater or lesser degree to those at bar. Before proceeding to examine them, however, it is appropriate briefly to discuss certain of the authorities cited by petitioner which are *not* applicable to the present situation.

The "Operational Activities" Cases. Petitioner cites and relies upon a number of decisions in which FELA liability has been imposed upon a railroad upon the reasoning and principles first enunciated by this Court in *Sinkler v. New York Pacific R. Co.*, 356 U. S. 326 (1958), cited at PB 15. It was there held that where the employee is injured through the negligence of an independent contractor to whom the defendant has delegated the conduct of a portion of its public utility "operational activities" (in that case terminal switching), such contractor will be considered the "agent" of the railroad within the meaning of §1 of the FELA, with the result that its negligence will be imputed to the railroad so as to impose liability upon it even in the absence of any fault on its part. Other cases cited by petitioner which proceed at least in part upon this theory are *Denver R. G. & W. R. Co. v. Conley*, 293 F. 2d 612 (C. A. 10th, 1961), cited at PB 13, 17; *Butz v. Union Pacific R. Co.*, 120 Utah 185, 233 P. 2d 332 (1951), cited at PB 15; *Schleuter v. East St. Louis Connecting Ry. Co.*, 316 Mo. 1266, 296 S. W. 105 (1927), cited at PB 16; and *Payne v. Baltimore & O. R. Co.*, 309 F. 2d 546 (C. A. 6th, 1962), petition for certiorari filed December 27, 1962, cited at PB 13, 15, 18.

Petitioner's reliance upon these authorities is misplaced for two reasons, each self-sufficient. First, as already noted, petitioner has expressly conceded that the validity of his jury verdict does not depend on the imputa-

tion to respondent of the P&LE's negligence, which is the necessary foundation of *Sinkler* and related cases. Second and equally important, there is no evidence whatever in the present record from which it may with reason be inferred that the transfer of United States mail by petitioner between the "mail men" and the P&LE's baggage car was in any way related to *respondent's* operational activities. The direct relationship between such mail transfer and the *P&LE's* franchised utility service is discussed in a subsequent portion of this brief. (See pp. 33-38, *infra*.)

To Impose Liability on Respondent, It Must Be Shown Either (a) That It Created the Defect; (b) That It Had Actual Knowledge of Its Existence; or (c) That It Had Been in Existence Long Enough to be Discovered By It. It would serve no useful purpose and would unduly prolong this brief to analyze in detail the many cases defining the nature and extent of a railroad's duty of care to employees who are required to leave its premises in the course of their work. It will be helpful, however, to attempt to summarize the principles to be distilled from these authorities, including those cited by petitioner.

First: With the exception of injuries caused by defective safety appliances, for which a railroad is absolutely liable without proof of negligence, it is not the guarantor of the safety either of its own premises or appliances or those of third parties. *Inman v. Baltimore & O. R. Co.*, 361 U. S. 227 (1959); *New York, N. H. & H. R. Co. v. Henagen*, 364 U. S. 441 (1960).

Second: Before a railroad can be charged with negligent failure to provide a safe place to work—whether on or off its own premises—there must be proof from which it can with reason be inferred that the railroad had actual or

constructive knowledge of the defective condition which renders the place of work unsafe. *Siegrist v. Delaware, L. & W. R. Co.*, 263 F. 2d 616, 619 (C. A. 2d), cert. den. 360 U. S. 917 (1959); *Sano v. Pennsylvania R. Co.*, 282 F. 2d 936, 937 (C. A. 3d, 1960); *Dobson v. Grand Trunk W. R. Co.*, 248 F. 2d 545, 548 (C. A. 7th, 1957); *Atlantic C. L. R. Co. v. Collins*, 235 F. 2d 805, 808 (C. A. 4th, 1956), cert. den. 352 U. S. 942, reh. den. 352 U. S. 982; *Fassbinder v. Pennsylvania R. Co.*, 193 F. Supp. 767 (W. D. Pa., 1961); *Miller v. Cincinnati, N. O. & T. P. Ry. Co.*, 203 F. Supp. 107, 111-12 (E. D. Tenn., 1962).

In the *Siegrist* case, the Court of Appeals said:

> "* * * The doctrine of notice was especially emphasized by the Supreme Court in Ringhiser v. Chesapeake & Ohio Railway Co., 1957, 354 U. S. 901, 77 S. Ct. 1093, 1094, 1 L. Ed. 2d 1268 in which the majority said that there was evidence 'that to respondent's knowledge employees used gondola cars for the purpose.' This essential ingredient was further stressed by the comment that 'there were probative facts from which the jury could find that respondent was or should have been aware of conditions which created a likelihood that the petitioner would suffer just such an injury as he did.' "

The *Miller* case is also noteworthy for its careful analysis of the present state of the law on this subject. There, after reviewing a number of this Court's recent FELA decisions which were claimed to have dispensed with the necessity of actual or constructive notice to the railroad, the Court said:

> "On the contrary, logic impels one to conclude that so long as liability is predicated upon negligence, as it is under the FELA, no defendant should be held liable for defective equipment of which he neither does nor, in the exercise of reasonable care, should

have knowledge. Each of the above cases cited by the plaintiff which involves the issue of notice, upon careful review, is believed to be in accord with this principle. Other authority is believed to uniformly support it. Kaminski v. Chicago River & Indiana R. Co., 200 F. 2d 1 (C. A. 7, 1952); Waller v. Northern Pacific Terminal of Oregon (1946) 178 Ore. 274, 166 P. 2d 488, cert. denied 329 U. S. 742, 91 L. Ed. 640, 67 S. Ct. 45; Frebes v. Michigan Central Railroad Co., (1922) 218 Mich. 367, 188 N. W. 424; Fassbinder v. Pennsylvania Railroad, (D. C. Pa., 1961) 193 F. Supp. 767. See also 35 Am. Jur., Master & Servant, Sec. 141." (203 F. Supp. at 111-12.)

Third: The amount of evidence which will justify submission to the jury of the question whether the railroad had actual or constructive notice or knowledge will of course depend upon the facts of the individual case. Because of the necessarily factual nature of this determination, general statements of the principles involved are not readily found. However, it is believed that three reasonably consistent lines of decision are discernible:

(1) In cases where the unsafe condition is "recurrent," "long-standing" or "continuous," and therefore necessarily apparent to railroad employees regularly working in the vicinity, the employer may be charged with notice of its existence even in the absence of direct testimony that a co-employee actually observed the condition and failed to correct it.

(2) In cases where the unsafe condition is "newly created," "unusual" or "sporadic," it is held that a jury issue of railroad negligence is made out only where there is such direct testimony.

(3) In cases where the defect comes into existence suddenly and is an isolated, sporadic, or unusual occur-

rence such that no railroad employee has had an opportunity to discover it, no liability attaches.

For the sake of clarity, examples of these three lines of authority will be discussed in reverse order.

Cases Where Railroad Had No Notice. The leading examples of the cases expressing this rule are *Kaminsky v. Chicago, R. & I. R. Co.*, 200 F. 2d 1 (C. A. 7th, 1952), and *Wetherbee v. Elgin J. & E. Ry. Co.*, 191 F. 2d 302 (C. A. 7th, 1951), subsequent appeal reported in 204 F. 2d 755 (C. A. 7th, 1953), cert. den. 346 U. S. 867 (1953), reh. den. 346 U. S. 928 (1954).

In the *Kaminsky* case, plaintiff was injured at night on the sidetrack of a third-party industry on which he was checking cars. He fell into an unused coal pit in the middle of a path which he had frequently used before, the pit having never before been left uncovered. Noting that defendant could be found negligent only if it knew or should have known of the condition, the court reversed and entered final judgment for the railroad upon the ground that the only possible inference was that the defect had existed a short time, perhaps only minutes or hours before the accident. (200 F. 2d at 3-4.)

In the *Wetherbee* case, the employee was killed when a railroad boxcar on which he was riding was derailed on an industry sidetrack by a gray-colored piece of wood which had lodged in the flangeway. On appeal following a jury verdict for plaintiff, the court reversed because there was no proof to indicate either that the railroad was responsible for the board's presence or that it had been there for more than a short time; as the court put it, it was "a new threat to safety." (191 F. 2d at 302.) However, the court remanded for further testimony from another

employee who had preceded the movement on foot and who might have been in a position to see the board. On retrial, it was uncontradicted that he had not been in a position to do so, whereupon a verdict was directed for defendant, which was affirmed on the second appeal.

To the same general effect is *Dobson v. Grand Trunk W. R. Co.*, 248 F. 2d 545, 548 (C. A. 7th, 1957), in which the court emphasized the necessity of proof of the continuance of a defect "over a long period of time," instead of being merely "temporary" or "occasional."

Cases Involving Direct Evidence of Railroad Knowledge. Many of the cases relied on by petitioner fall into this category.

Harris v. Pennsylvania R. Co., 361 U. S. 15 (1959), reversing 168 O. S. 582, 156 N. E. 2d 882 (1959), which in turn reversed 108 O. App. 541, 146 N. E. 2d 744 (1957), upon which petitioner places heavy reliance (PB 12-13) is plainly distinguishable on this basis. There, as shown in the opinion of the Ohio Supreme Court (168 O. S. at 583), the jury found the defendant railroad to be negligent, and made a special finding that the tie upon which plaintiff had been required to walk while lifting a heavy timber was uneven and covered with grease and oil, thus affording an unstable footing. In holding the employee entitled to judgment, this court's brief *per curiam* opinion stated nothing more than that the proofs "justified with reason" the jury's conclusions. However, the opinion of the Ohio Court of Appeals, in which the employee had prevailed, makes inescapably clear (108 O. App. at 544-5) that the ultimate result was predicated not upon the railroad's failure to inspect and discover defects on the premises of another railroad, but upon the fact that plaintiff's foreman, an employee of the *defendant* railroad, had seen and

knew of the slippery and unstable footing on which plaintiff was working, and had in fact refused plaintiff's request for additional help just before his injury.

Chicago & G. W. Ry. Co. v. Smith, 228 F. 2d 180 (C. A. 8th, 1955), cited at PB 17, is likewise in this category. There, plaintiff brakeman fell while carrying a crate of eggs across a walkway made of rotting, uneven railroad ties, one of which rolled or crumbled beneath his foot. Although the opinion is not entirely clear, the walkway had apparently been constructed about six months before by the defendant. To the extent that this is so, it obviously had *actual* notice of the defect. Similarly, the *Schleuter* case, already cited, 316 Mo. 1266, 296 S. W. 105 (1927), imposed liability upon the railroad at least in part upon the ground that the defendant's trainmaster and other employees had actual knowledge of the deteriorated track condition which brought about the derailment. (296 S. W. at 112.)

Cases Involving Hazards of a Permanent or Long-Standing Nature. The remaining cases cited by petitioner are without exception classifiable under this heading, as is readily shown by the following brief statements of the facts of each.

In *Ellis v. Union Pacific Co.*, 329 U. S. at 649 (1947), cited at PB 12, plaintiff's injury was brought about by *permanent* conditions of close clearance on an industrial sidetrack of which the defendant could not help but be aware. Moreover, there was evidence that the railroad was itself responsible for the possibly negligent positioning of a close clearance sign in a location not readily visible to plaintiff. The result is thus justifiable on two separate grounds.

In *Atlantic C. L. R. Co. v. Robertson*, 214 F. 2d 746 (C. A. 4th, 1954), cited at PB 13, plaintiff was run over by an industry switch engine which he could not see or hear because of *chronic* conditions of steam, dust and noise fully known to the defendant. As the court said, "The conditions prevailing in the yard * * * *were not sporadic or unusual, but customary and continuous* * * *." (214 F. 2d at 751; emphasis supplied.)

In *Chesapeake & O. Ry. Co. v. Thomas*, 198 F. 2d 783 (C. A. 4th, 1952), there was testimony that the fireman of the train on which decedent employee was killed was upon notice of the possibly dangerous position of an overhanging pipe. It was also shown that the railroad was on notice that a safety chain used to retain the pipe in a safe location had been missing for a year prior to the accident.

In *Kooker v. Pittsburgh & L. E. R. Co.*, 258 F. 2d 876 (C. A. 6th. 1958), plaintiff was injured when he fell on an icy and slippery path assumed by the court to be on the premises of another railroad. The court held that the fact that defendant had salted the path when slippery on earlier occasions justified submission to the jury of the issue of whether it had exercised dominion over it. The result in the *Kooker* case is thus proper, for although the slippery condition may not have been continuous, the defendant railroad was plainly aware of weather conditions and the resultant hazard to its employees if it failed to salt the path.

In *Beattie v. Elgin J. & E. R. Co.*, 217 F. 2d 863 (C. A. 7th, 1954), cited at PB 13 and 16, plaintiff's fall was caused by grease which rendered slippery the spot where he was required to uncouple cars on an industry's coal dumper. Because the grease was "always" there when the machine

was operating, it was held that the jury was justified in finding that the unsafe condition had existed "frequently and recurringly for such a long time" that defendant was on notice of its existence. The *Kaminsky* and *Wetherbee* cases were distinguished on the ground that the dangers there were "a new threat," had been created "only a short time before," and were "sporadic and occasional." (217 F. 2d at 866.)

Likewise, the accident in *Terminal R. Ass'n. of St. Louis v. Fitzjohn*, 165 F. 2d 473 (C. C. A. 8th, 1948), was caused by the *permanent* presence of a light standard located a scant six inches from the sides of boxcars moving next to the loading ramp of a Government-owned plant, plaintiff having been knocked off the side ladder of a car when he struck the standard.

Reference has already been made to *Chicago & G. W. Ry. Co. v. Smith*, 228 F. 2d 180 (C. A. 8th, 1955), *supra*, p. 28, cited at PB 17. The court also held as follows with regard to the pathway made of rotting ties:

> "The walkway here involved had been in existence for over six months. Defendant had ample opportunity to be fully informed as to the condition of the walkway since its construction." (228 F. 2d at 184.)

The court distinguished the *Kaminsky* case, *supra*, on the ground of the shortness of time that the defect there had been in existence.

It has already been noted that *Butz v. Union Pacific R. Co.*, 120 Utah 185, 233 P. 2d 332 (1951), is distinguishable on the ground that it is an "operational activity" case. The case is further distinguishable from the facts at bar in that it involved permanent conditions of reduced visibility, track curvature, and marginal and unprotected clearance limits, among others, all of which justified sub-

mission to the jury of the question whether the railroad should have foreseen the likelihood of plaintiff's being knocked off the car and taken further precautions.

The *Schleuter* case, 316 Mo. 1266, 296 S. W. 105 (1927), is also an "operational activity" case. But in addition, it was held that even in the absence of actual notice to defendant of the defective track condition, it was on constructive notice thereof because the condition had existed "for at least a year."

Van Horn v. Southern Pacific Co., 141 Cal. App. 2d 528, 297 P. 2d 479 (1956), and *Chicago, G. W. Ry. Co. v. Casura*, 234 F. 2d 441 (C. A. 8th, 1956), both involved injuries to railroad employees by *permanent* defects on industry sidetracks. In the *Van Horn* case, the defect was a wooden manhole lid upon which plaintiff fell because the absence of provision for drainage from the underlying hole had caused it to float and become unstable. The court specifically recognized the necessity of evidence that the condition existed for a long enough time to have been discovered by the railroad, citing and following the *Kaminsky* case in this respect. In the *Casura* case the accident was caused by an industry's open gate which fouled its sidetrack during switching operations. The accident would not have happened had the industry equipped the gate with proper and secure fastenings. These conditions had existed for a long enough period to have been readily discovered by the railroad prior to the accident.

Petitioner's remaining case, *Payne v. Baltimore & O. R. Co.*, 309 F. 2d 546 (C. A. 6th, 1962) is of doubtful value as precedent in view of the pendency of a petition for certiorari filed in this Court on December 27, 1962. But in any event, to the extent that that case turns on the submissibility of the railroad's own negligence, rather

than imputation of that of the industry, the evidence was such that the jury could have found that the ash pile causing the derailment had accumulated because of the industry's "usual custom" of loading ashes over the sidetrack, as it had done for years to the knowledge of the railroad. The *Payne* case is thus not analogous to the present case.

The Railroad Had No Knowledge or Notice Here. Any fair analysis of petitioner's authorities can lead to but one conclusion: that each and every one of them is distinguishable from the facts of the present case, and that the present case belongs in the category of *Kaminsky* and *Wetherbee* cases, where the railroad had no knowledge or notice of the defect or hazard. To recapitulate:

First, since the delivery of mail to and from trains of the P&LE was *not* an "operational activity" of defendant B&O, the latter was not chargeable with the former's knowledge of, or negligent failure to repair, the defective door.

Second, there is no evidence whatever as to how long the door had been defective, *i. e.*, as to the "permanence" of the defect.

Third, even assuming the defect to have been of long standing, it not only was never present on B&O premises and was present on the adjacent P&LE premises for no more than a minute or two before the accident. It was thus physically impossible for any B&O employee other than petitioner to have discovered it. As stated in the *Beattie* and *Kaminsky* cases, it was a "new threat to safety" which no amount of care by the B&O could have eliminated.

C. For Want of Evidence and Failure to Appeal, Petitioner Has Abandoned His F. E. L. A. Rights Against the P. & L. E.

Running throughout petitioner's argument is the assumption, never clearly articulated but necessarily implicit, that railroad employees are or should be entitled to their day in court under the FELA whenever or wherever it is shown that they have been injured during the course of their work. For example, petitioner quotes out of context an excerpt from the *Beattie* case, PB 16, which if interpreted literally would make a railroad negligent if it fails to inspect and make safe any and all premises, equipment and appliances, wherever located, in any case where it is shown "that plaintiff at the time of the accident was in a place where his assigned duties required him to be." (217 F. 2d at 866.) Again at page 15 petitioner quotes passages from the *Butz* and *Payne* cases which, literally applied, would create jury issues upon a bare showing that its employees had been injured on the premises of third parties.

Not only would this rule impose an impossible burden of inspection upon the nation's railroads, but it requires no citation of this Court's frequently reiterated pronouncements to demonstrate that it is not the law. Congress did not enact an open-ended, jury-administered workmen's compensation scheme in passing the FELA. Negligence is still required, and a standard which would impose a greater duty of care *off* railroad premises than on is plainly inconsistent with negligence.

What petitioner fails to recognize is that so long as *negligence* remains the standard, there will inevitably be a large class of cases in which railroad employees will have no choice but to look to third parties for redress of injuries

occurring on duty. Suppose, for example, that petitioner's injury in the present case had resulted from a defective door on the U. S. mail truck to which he delivered the mail bags which he took off the P&LE train. Or suppose that he had met with an accident at the hands of third parties while traveling about the streets of New Castle in the performance of his duty to call B&O train crews. Can there be any question but that in each of these instances petitioner would be remitted to an action against the United States or the third parties, strangers to the railroad, whose negligence caused his injury? Recent decisions of unquestioned correctness have so held. *Spinello v. New York, C. & St. Louis R. Co.*, 173 O. S. 324, 181 N. E. 2d 884 (1962); *Simpson v. Texas & N. O. R. Co.*, 297 F. 2d 660 (C. A. 5th, 1962).

The present case is no different in either fact or principle. Petitioner's proper remedy here, if any, was against the P&LE rather than respondent. In all probability either one or both of two well settled legal doctrines would have afforded him FELA rights as an employee of the P&LE if the proper evidentiary foundation had been laid.

The Loaned Servant Doctrine. Ever since this Court's decision in *Standard Oil Co v. Anderson*, 212 U. S. 215, 221-22 (1909), it has been settled that where a general employer furnishes a servant to a special employer to perform the work of the latter the servant becomes the employee of the special employer so far as master-servant negligence liability is concerned. As applied to FELA actions, it was made clear in *Linstead v. Chesapeake & O. R. Co.*, 276 U. S. 28, 34-5 (1928), that when one railroad furnishes its general employee to another railroad under

an arrangement such that it is the work of the latter, and not that of the employer railroad, which the employee is performing, the employee's right of action for negligent injury in the course of such work is against the special, rather than the general, employer.

Subsequent decisions have consistently applied the *Linstead* rule in both FELA cases (*Shaw v. Monessen S. W. Ry. Co.*, 200 F. 2d 841, 843n.4 [C. A. 3d 1952]; *Byrne v. Pennsylvania R. Co.*, 262 F. 2d 906, 912-13 [C. A. 3d, 1958]) and non-FELA cases. *Denton v. Yazoo & M. V. R. Co.*, 284 U. S. 305 (1931); *Jones v. George F. Getty Oil Co.*, 92 F. 2d 255, 259-60 (C. C. A. 10th, 1937). And as the last-cited case makes clear, the fact that the immediate supervision of the employee comes from the general employer (the B&O in the instant case) is not controlling provided that the special employer (the P&LE) has the power to terminate the work and exclude the employee from the job.

The application of these authorities to the present case would be clearer if the record regarding the B&O-P&LE relationship were not so fragmentary and incomplete. The evidence in this connection was of course readily subject to petitioner's subpoena, but he elected not to avail himself of it. But even on the meager facts which are in evidence, it is apparent that there was a very real possibility that petitioner might have made out an FELA jury case against the P&LE under these authorities, since the work he was doing at the time of his accident was unquestionably that of the P&LE. Moreover, it was the P&LE alone which had the right to originate, schedule, and terminate the work, and it was the P&LE train employee whose instructions petitioner was in the act of carrying out when injured.

The "Operational Activities" Doctrine. Alternatively, petitioner could have bottomed his case against the P&LE on the line of decisions (considered *supra*, pp. 22-23) which confers FELA rights upon employees of independent contractors to whom a railroad has attempted to delegate the conduct of its public utility "operational activities." This Court has not yet indicated whether the rule of the *Sinkler* case, 356 U. S. 326 (1958), which enunciated this doctrine as a test for the determination of the independent contractor's status as an "agent" whose negligence might be imputed to the railroad under § 1 of the Act, is to be applied also to determine whether a given plaintiff is an "employee." At least one subsequent case has so held. *Oregon Shore Line R. Co. v. Idaho Stockyards Co.*, 12 Utah 2d 205, 364 P. 2d 826 (1961); and see *Mazzucola v. Pennsylvania R. Co.*, 281 F. 2d 267, 270 (C. A. 3d, 1960), and *Ward v. Atlantic Coast Line R. Co.*, 362 U. S. 396 (1960).

However, there are a number of earlier cases whose authority has never been questioned holding that employees of third parties whose work is within the scope of a railroad's franchised operational activities are entitled to the benefits of the FELA. *Erie R. Co. v. Margue*, 23 F. 2d 667 (C. C. A. 6th, 1928); *Eddings v. Collins Pipe Co.*, 140 F. Supp. 622 (N. D. Cal., 1956). Moreover, the rule has specifically been held to apply where the employee of one railroad is temporarily engaged in the performance of the operational activities of another railroad. *Atlantic Coast Line R. Co. v. Tredway*, 120 Va. 735, 98 S. E. 560 (1917).

Although one is again confronted with the skeletal state of the record in attempting to assess the impact of the operational activities doctrine on the facts of this case, its application is perhaps somewhat clearer than that of the loaned servant doctrine, for there is no escaping the

fact that it was incumbent upon the P&LE as a matter of law to provide the manpower to handle the mail. Title 39, Code of Federal Regulations, Rev. 1955, § 92.8,* provides:

> "A railroad must furnish the necessary employees to handle mail, *to load and pile mail into and unload mail from storage and baggage cars.*" (Emphasis supplied.)

In the face of this regulation, it is difficult to conceive of a type of railroad work more directly and obviously of an "operational" or public utility nature than that being performed by petitioner *for the P&LE* at the time of his injury.

Neither of the foregoing lines of authority was presented to the District Court in conjunction with its ruling on the P&LE's motion for a directed verdict (see R. 72-6), and as has been observed, no appeal was taken from the granting of that motion. Hence, although petitioner's FELA rights could in all probability have been fully vindicated by development of the necessary facts, the conclusion is inescapable that he has abandoned them.

It is of course no consolation to petitioner that he has mistaken his remedy and thereby forfeited valuable rights which with diligence he might have preserved. But as this Court has had occasion to hold, a decision not to appeal, however mistaken its basis, is a "calculated and deliberate" risk, "such as follows a free choice." One who abandons a right of appeal "cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong * * *.

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* In *Denton v. Yazoo & M. V. R. Co.*, 284 U. S. 305, 307 (1931), the facts of which are probably distinguishable, it was held that the predecessor of this postal regulation made a mail clerk employed by the railroad the special employee of the United States while "engaged in loading United States mail into a mail car, under the direction of a United States postal transfer clerk."

There must be an end to litigation some day, and free, calculated, deliberate choices are not to be relieved from judgment." *Ackermann v. U. S.*, 340 U. S. 193, 198 (1950). And see *Polites v. U. S.*, 364 U. S. 426, 432, 437-8 (1960).

CONCLUSION.

Petitioner's evidence was insufficient to take this case to the jury against the respondent B&O. Nor can the basic and inescapable failure of evidence be lightly brushed aside on the ground that it is a mere technicality or a "refined concept," as petitioner puts it. (P. B. 11.) Perhaps the most compelling demonstration of petitioner's failure to adduce "even the slightest" evidence of negligence is found in the fact that notwithstanding his many general assertions that respondent "should have been aware of the defective door" (P. B. 18), he nowhere makes any attempt to demonstrate how, by whom and under what circumstances this knowledge could have been imparted to the railroad. In default of such testimony, there are only two possible means by which the judgment for petitioner can be sustained. Adopting petitioner's approach to the case, the factual deficiencies of the record can be glossed over and the verdict upheld upon a simple reiteration of the usual generalities concerning the non-delegable nature of respondent's duty of care. A decision of that sort would preserve petitioner's trial court victory at the inevitable expense of the future administration of the Act, since in that event, the nation's trial and appellate courts would be left to determine as best they could whether the outer limits of railroad liability had been expanded, and if so, to what extent.

Alternatively, this Court might attempt to formulate some sort of new general principle—perhaps by extending

the *Sinkler* doctrine—which would embrace the facts of this case. As to this possibility, it is sufficient to observe that petitioner has expressly relinquished all contentions based on *Sinkler's* principle of imputed negligence and has suggested no other formula which would justify his verdict without converting the FELA into a workmen's compensation statute.

Respondent submits that the decisions of this and lower courts provide fully sufficient guidelines for the resolution of this case, and that no new formula is conceivable consistent with the negligence concept of the statute.

Accordingly, the judgment of the Third Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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